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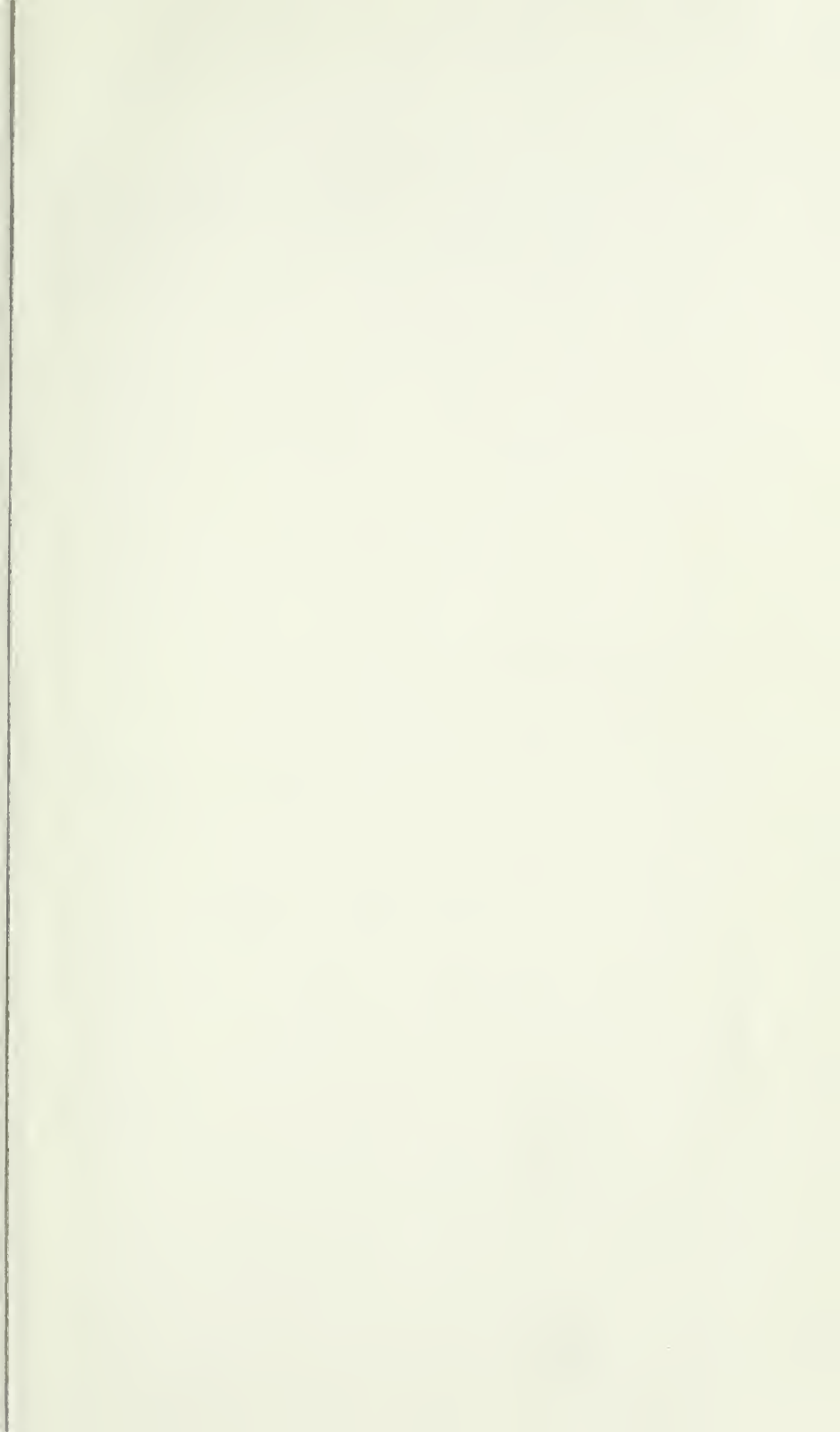
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2987

No. 15339

United States
Court of Appeals
for the Ninth Circuit

AMERICAN TRUST COMPANY, a Corporation,
Appellant,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
and UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

DEC 26 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 33,507

AMERICAN TRUST COMPANY, a Corporation,
as Trustee,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
and the UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Plaintiff American Trust Company, a corporation, for its complaint alleges:

First Claim for Relief Against the Defendant
James G. Smyth, Formerly Collector of Internal Revenue.

1. This action is brought to recover Federal income taxes erroneously and illegally collected by the defendant James G. Smyth from the plaintiff. The action arises under Sections 22 (b) (7), 322, 3771 and 3772 of the Internal Revenue Code, and this Court has jurisdiction of this action by virtue of 28 United States Code, Sections 1331 and 1340.

2. The plaintiff, American Trust Company, now is and at all times herein mentioned has been a corporation organized under the laws of California, with its principal place of business located in San

Francisco, California. As such it is and has been authorized to act as trustee of express trusts, and since February 28, 1938, it has been trustee of a certain testamentary trust created by Harry L. Tevis, who died on July 19, 1931.

3. Defendant James G. Smyth was at all times since May 14, 1945, and until September 27, 1951, the Collector of Internal Revenue for the First District of California. On September 27, 1951, said defendant retired from office as Collector of Internal Revenue and is not now in such office, but is still alive and resides within the territorial jurisdiction of this Court.

4. During the year 1946 the plaintiff as trustee of the Tevis trust sold certain shares of the corporate stock of Kern County Land Co., a corporation, and certain other securities which comprised part of the corpus of such trust, and on such sales realized capital gains or profits in the aggregate sum of \$1,141,915.72. Under the provisions of California law these gains and profits were not distributable to the life beneficiaries of the trust, but the entire proceeds of the sales were required to be and were retained by the trustee as part of the corpus of the trust.

5. On or about March 14, 1947, plaintiff as trustee of the said trust duly filed a Federal Fiduciary Income Tax Return for the calendar year 1946 with the Collector of Internal Revenue for the First District of California, in which were reported the

transactions described in paragraph 4 above. Thereafter and on the dates and in the amounts hereinafter set forth, defendant James G. Smyth, as Collector of Internal Revenue, collected from the plaintiff, and the plaintiff, acting as the trustee of the aforesaid trust, overpaid to the defendant as Collector of Internal Revenue, in respect of income taxes reported on said Return, \$570,957.86 in quarterly installments as follows:

| | |
|-------------------------|--------------|
| March 14, 1947 | \$142,739.48 |
| June 9, 1947 | 142,739.46 |
| September 8, 1947 | 142,739.46 |
| December 11, 1947 | 142,739.46 |

6. Thereafter, on or about November 28, 1949, the plaintiff as trustee of the aforesaid trust duly filed a claim for refund with the Commissioner of Internal Revenue, contending that such amounts aggregating \$570,957.86 were erroneously and illegally collected by the defendant James G. Smyth as Collector of Internal Revenue. The said claim for refund set forth the same grounds for refund as are set forth in the complaint herein.

7. On or about April 25, 1952, the Commissioner of Internal Revenue mailed to plaintiff by registered mail a notice of the disallowance in full of plaintiff's claim for refund. No part of said \$570,957.86 with interest thereon as provided by law has ever been refunded to plaintiff.

8. On July 19, 1931, Harry L. Tevis, late of the County of Santa Clara, State of California, died

testate. Pursuant to proceedings duly had and taken in the Superior Court of the State of California in and for the County of Santa Clara, on August 19, 1931, the Superior Court duly made and rendered its order, admitting the will of the decedent, Harry L. Tevis, to probate, and on July 26, 1935, duly made and rendered a final decree of distribution ordering the distribution by the executors to the trustees of the several trusts created under the will of Harry L. Tevis, and such a distribution to such trustees was duly made.

9. Harry L. Tevis died unmarried and without children. Under his will, Harry L. Tevis bequeathed certain specific legacies in cash to named individuals, created four trusts in equal amount for each of the four sons of his brother, William S. Tevis, and a trust in equal amount for one Edwin Lee Dunlap. By paragraph Seventh of his will all the rest and residue of any and all property owned by decedent at his death was bequeathed as follows:

(a) One-half to the decedent's niece, Florence Fermor-Hesketh;

(b) all of the remaining one-half not disposed of as set forth in subparagraph (c) below in trust for the children of Florence Fermor-Hesketh born before decedent's death, with remainders over, the terms of said trust being set forth in paragraph 11 of this complaint;

(c) out of the one-half not disposed of to Florence Fermor-Hesketh, a named sum in trust for the

decedent's brother, William S. Tevis, with remainders over to decedent's four nephews, the sons of his brother William.

10. In his will, Harry L. Tevis named one Fred T. Elsey as trustee of each of the trusts set up under the will and named the plaintiff as successor trustee. Said Fred T. Elsey duly qualified and served as trustee until February 28, 1938, when such trustee ceased to act as trustee. In pursuance of proceedings duly had and taken in said Superior Court for the County of Santa Clara, such Court issued an order duly made and rendered, confirming the appointment of the plaintiff as successor trustee of the trusts set up under paragraph Seventh, subdivision (b), of the said will of Harry L. Tevis, and since then plaintiff has been the duly qualified and acting trustee of such trust, and has held and possessed the corporate shares and securities constituting the corpus of such trust, including the shares and securities sold within the year 1946 as set forth in paragraph 4 above.

11. The said final decree of distribution made and rendered by the said Superior Court on July 26, 1935, incorporated the said will of Harry L. Tevis and distributed a portion of the property of said decedent in accordance with subparagraph (b) of paragraph Seventh of said will. Said subparagraph (b) of paragraph Seventh read and reads as follows:

“(b) All that part of the remaining one-half thereof which is not disposed of by the provisions

of subdivision (c) of this paragraph (Seventh) I give, devise and bequeath to Fred T. Elsey, as Trustee, upon the uses and trusts, and for the purposes and with the powers hereinafter specified, namely:

“To receive the rents, issues and profits and income of the trust estate, and to pay the net rents, issues, profits and income therefrom in equal shares to the children of my niece Florence Fermor-Hesketh born before my death, or to the survivor or survivors of them, during their lives, respectively.

“If any of the said children of my said niece, Florence Fermor-Hesketh, shall have predeceased me, leaving issue living at my death, my said trustee shall forthwith transfer, pay over and deliver to the said issue of each of said children who predeceases me (and there is hereby given, devised and bequeathed to the issue living at my death of each of said children of my said niece who shall predecease me) one of as many portions of the said corpus of the trust aforesaid as shall be ascertained by adding together the number of the children of my said niece living at my death and the number of her children who predecease me leaving issue living at my death.

“If after my death any of the said children of my niece born before my death shall die leaving issue, then there shall be transferred, paid over and delivered to such issue (and in that event there is hereby given, devised and bequeathed to such issue)

one of as many parts of the aforesaid trust fund as shall be ascertained by adding together the number of the children of my said niece living at my death and the number of her children who predecease me leaving issue living at my death.

“If upon the death of the last of the children of my said niece born before my death and after the issue of each of them who left issue either living at my death, or born thereafter, shall have received the portion of the trust fund which it is hereinabove provided shall be delivered to them, there shall be any overplus in the hands of such trustee, said overplus shall be then transferred, paid over and delivered (and, in that event, there is hereby given, devised and bequeathed) to the then living issue of the said children of my said niece in equal shares per capita and not per stirpes.”

12. By paragraph Tenth of the will of Harry L. Tevis it was provided that:

“The word ‘children’ wherever used in this will means and includes only the first generation of direct lineal descendants. The word ‘issue’ wherever used in this will means and includes direct lineal descendants of all generations.”

13. Florence Fermor-Hesketh, the decedent's niece, has had five children, all of whom were born prior to the decedent's death, namely, Thomas S. Fermor-Hesketh, born October 7, 1910; Louise Fermor-Hesketh Stockdale, born December 15, 1911; Flora Fermor-Hesketh Lawson, born February 23,

1913; Frederick Fermor-Hesketh, born April 8, 1916; and John Breckenridge Fermor-Hesketh, born March 7, 1917. Thomas S. Fermor-Hesketh died on June 21, 1937, without issue. The decedent's niece, Florence Fermor-Hesketh, had no child or children who predeceased the decedent, and at the time of the decedent's death no child of Florence Fermor-Hesketh had predeceased the decedent leaving issue living at the decedent's death.

14. During the calendar year 1946 the living direct lineal descendants of the children of Florence Fermor-Hesketh were: the two children of Louise Fermor-Hesketh Stockdale, namely: Ann Louise Stockdale, born May 30, 1938, and Thomas Stockdale, born January 7, 1940; and the three children of Florence Fermor-Hesketh Lawson, namely: John Baring, born August 16, 1934; James Baring, born August 16, 1938 (sons by a former marriage), and Arabella Ann Lawson, born August 14, 1946. All of these direct lineal descendants were and are unmarried.

15. Thomas S. Fermor-Hesketh until his death and each of the four living children of Florence Fermor-Hesketh born prior to the decedent's death named in paragraph 13 above and each of the children of such children named in paragraph 14 above were at the date of the decedent's death and continuously have been since such death residents of the United Kingdom of Great Britain and Ireland not engaged in trade or business in the United States, within the meaning of a certain treaty or

Tax Convention between the Government of the United States and the Government of the United Kingdom proclaimed by the President of the United States on July 30, 1946, and effective January 1, 1945 (60 Stats. 1377).

16. The four living children of Florence Fermor-Hesketh and the grandchildren of Florence Fermor-Hesketh named in paragraphs 13 and 14 above were all born domiciled in and subjects and residents of the United Kingdom; since the dates of their respective births they have continued to be domiciled in and subjects and residents of the United Kingdom; they have lived continuously in the United Kingdom; their interests and affairs have all centered in the United Kingdom; their present intention is to remain domiciled in and subjects and residents of the United Kingdom indefinitely, and there is no likelihood that prior to the respective deaths of the four children of Florence Fermor-Hesketh such children and the five grandchildren of Florence Fermor-Hesketh will not remain domiciled in and subjects and residents of the United Kingdom.

17. The United States income taxes amounting to \$570,957.86 collected from the plaintiff as trustee under the aforesaid trust by the defendant James G. Smyth as Collector of Internal Revenue were erroneously and illegally collected and are refundable to the plaintiff. The gain or profit on the sale of the trust securities made by the plaintiff as

trustee in 1946 amounting to \$1,141,915.72 was not subject to United States income taxes, but, on the contrary, such gain was expressly freed from the burden of and made exempt from any and all United States taxes under the provisions of Section 22 (b) (7) of the Internal Revenue Code which exempts income of any kind to the extent required by any treaty of the United States, including the aforesaid Treaty between the Government of the United States and the Government of the United Kingdom, proclaimed by the President of the United States on July 30, 1946. Article XIV of the aforesaid Treaty provides:

“A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States taxes on gains from the sale or exchange of capital assets.”

18. In making the sales resulting in such aforesaid capital gains the plaintiff as trustee was acting in a fiduciary capacity. Under the terms of the trust and the law of California, the proceeds from the sales were required to be and were retained as part of the corpus of the trust, and income taxes, if any, arising from such sales were chargeable against the corpus of the trust. The income taxes collected by the said Collector of Internal Revenue on the aforesaid sales constituted an illegal and unwarrantable burden on residents of the United Kingdom not engaged in trade or business in the United States, in direct violation of Section 22 (b)

(7) of the Internal Revenue Code, as particularized by Article XIV of the aforesaid treaty, which relieves such residents from United States taxes on gains from the sale of capital assets whether such assets are directly owned or are held beneficially for such residents under an express trust, and also in violation of the requirements of the aforesaid treaty guaranteeing reciprocity of treatment in respect of capital gains by the subjects and citizens of the two contracting parties, whether the property giving rise to such capital gains is directly owned or is held beneficially for such residents under an express trust.

19. At all times material to this action, under the laws of the United Kingdom gains on the sale of capital assets, including gains on the sale by a trustee of an express trust of securities constituting the corpus of such trust, were and are exempt from any income taxes imposed by the United Kingdom, except in the narrow case where the seller is a "trader" in securities not here applicable. The generally accepted meaning of the word "exempt" in the United States and in the United Kingdom, as defined in American and British standard dictionaries of the English language, is to free from, as from some liability or burden, or not made subject to a charge, payment or tax.

20. The defendant James G. Smyth is indebted to plaintiff, as trustee for the beneficiaries of said trust, in the sum of \$570,957.86, with interest

thereon as provided by law, no part of which has been paid.

Second and Alternative Claim for Relief Against the Defendant, the United States of America.

1. This action is brought to recover federal income taxes erroneously and illegally collected by the defendant James G. Smyth from plaintiff and by him paid to the defendant United States of America. This action arises under Sections 22 (b) (7), 322, 3771 and 3772 of the Internal Revenue Code, and this Court has jurisdiction of this action by virtue of 28 United States Code, Sections 1331, 1340 and 1346. The claim is in substitution for the claim against the defendant James G. Smyth as Collector of Internal Revenue and is authorized under 28 United States Code, Section 1346, since such Collector has retired and is not now in office at the institution of the suit.

2. Plaintiff herein incorporates by reference all the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the First Claim for Relief.

3. The defendant United States of America is indebted to plaintiff, as trustee for the beneficiaries of said trust, in the sum of \$570,957.86, with interest thereon as provided by law, no part of which has been paid.

Third and Alternative Claim for Relief Against the Defendant, the United States of America.

1. This action is brought to recover federal income taxes erroneously and illegally collected by the defendant James G. Smyth from plaintiff and by him paid to the defendant United States of America. This action arises under Sections 22 (b) (7), 322, 3771 and 3772 of the Internal Revenue Code, and this Court has jurisdiction of this action by virtue of 28 United States Code, Section 1346.

2. Plaintiff incorporates herein by reference all of the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the First Claim for Relief.

3. The defendant United States of America is indebted to the plaintiff as trustee for the beneficiaries of said trust in the sum of \$570,957.86, with interest thereon as provided by law, no part of which has been paid.

Wherefore, the plaintiff demands judgment:

(1) On the first claim for relief against the defendant James G. Smyth, former Collector of Internal Revenue, for \$570,957.86, interest, costs and general relief;

(2) In the alternative, on the second claim for relief against the defendant, the United States of America, for \$570,957.86, interest, costs and general relief;

(3) In the alternative, on the third claim for relief against the defendant, the United States of America, for \$570,957.86, interest, costs and general relief.

/s/ HOWARD J. FINN,

/s/ THEODORE R. MEYER,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

/s/ MONTGOMERY B. ANGELL,

DAVIS, POLK, WARDELL,
SUNDERLAND & KIENDL,

Of Counsel.

[Endorsed]: Filed April 21, 1954.

[Title of District Court and Cause.]

DEFENDANTS' ANSWER TO PLAINTIFF'S
COMPLAINT

The defendant, James G. Smyth, Collector of Internal Revenue, and the defendant, the United States of America, by their attorney, Lloyd H. Burke, United States Attorney, in and for the Northern District of California, Southern Division, for their answer to plaintiff's complaint herein, admit, deny and allege as follows:

First Claim Against the Defendant James G. Smyth

1. The allegations in Paragraph 1 are admitted except that it is denied that the income taxes involved were erroneously or illegally collected.

2. The allegations in Paragraph 2 are admitted.

3. The allegations in Paragraph 3 are admitted.

4. The allegations in Paragraph 4 are admitted.

5. The allegations in paragraph 5 are admitted except that it is denied that the plaintiff acting as trustee of the aforesaid trust overpaid said taxes, but defendants allege that on the contrary said taxes were properly and legally paid and collected and were due and owing at the time of the payment thereof by the plaintiff.

6. The allegations in Paragraph 6 are admitted except that it is denied that the amounts involved or any part thereof were erroneously or illegally collected.

7. The allegations in Paragraph 7 are admitted.

8. The allegations in Paragraph 8 are admitted.

9. The allegations in Paragraph 9 are admitted.

10. The allegations in Paragraph 10 are admitted.

11. The allegations in Paragraph 11 are admitted.

12. The allegations in Paragraph 12 are admitted.

13. The allegations in Paragraph 13 are admitted.

14. The allegations in Paragraph 14 are admitted.

15. The allegations in Paragraph 15 are admitted, except that it is denied that the treaty or tax convention referred to has any application to the parties mentioned and referred to in said paragraph or that said parties fall within any the provisions of the treaty or tax convention under the facts in this case.

16. The allegations in Paragraph 16 are admitted except that the defendants have insufficient knowledge or information upon which to form a belief as to the present intention of said parties to remain domiciled in and subjects and residents of the United Kingdom indefinitely or that there is no likelihood that prior to the respective deaths of the four children and five grandchildren referred to said children and grandchildren will not remain domiciled in and subjects and residents of the United Kingdom.

17. The allegations in Paragraph 17 are denied.

18. The allegations in Paragraph 18 are denied except that it is admitted that plaintiff acted as trustee under the provisions of the will of said Harry L. Tevis, aforesaid, and that under the terms of the trust and the laws of California the proceeds from the sales were required to be and were retained as part of the corpus of the trust and that income taxes arising from such sales were chargeable against the corpus of the trust.

19. Answering Paragraph 19 defendants have insufficient knowledge or information upon which

to form a belief as to the correctness of the allegations set forth therein. Defendants deny that the meaning of the word "exempt" has the meaning attributed thereto by the plaintiff insofar as the interpretation of Article XIV of the treaty between the United States and the United Kingdom is concerned.

20. The allegations in Paragraph 20 are denied.

Second Alternative Claim for Relief Against the
Defendant, the United States of America

1. The allegations in Paragraph 1 are admitted except that it is denied that the income taxes referred to were erroneously or illegally collected by the defendant, James G. Smyth.

2. Defendants incorporate by reference all of the allegations of Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of their answer to the corresponding paragraphs of the First Claim for Relief.

3. The allegations in Paragraph 3 are denied.

Third and Alternative Claim for Relief Against the
Defendant, the United States of America

1. The allegations in Paragraph 1 are admitted except that it is denied that the income taxes were erroneously or illegally collected by the defendant, James G. Smyth.

2. Defendants incorporate herein by reference all of their allegations in Paragraphs 2 to 19, in-

clusive, of their answer to corresponding paragraphs of plaintiff's First Claim for Relief.

3. The allegations in Paragraph 3 are denied.

Defendants specifically deny each and every allegation in plaintiff's complaint herein not specifically admitted or qualified herein.

Wherefore, defendants pray that the complaint be dismissed; that defendants have judgment for costs and for all just and proper relief.

/s/ LLOYD H. BURKE,
United States Attorney.

Affidavit of Mail attached.

[Endorsed]: Filed August 17, 1954.

[Title of District Court and Cause.]

STIPULATION No. 2

Subject to the approval of the Court, it is hereby stipulated by the parties, through their respective attorneys, that the complaint herein is hereby amended as follows:

1. Paragraph 4 of the complaint is amended so that it reads:

"4. During the year 1946 the plaintiff as trustee of the Tevis trust sold certain shares of the corporate stock of Kern County Land Co., a corporation, and certain other securities which comprised

part of the corpus of such trust, and on such sales realized gross long term capital gains of \$2,302,733.54 and net long term capital gains taken into account in the aggregate sum of \$1,141,915.72. Under the provisions of California law these gains and profits were not distributable to the life beneficiaries of the trust, but the entire proceeds of the sales were required to be and were retained by the trustee as part of the corpus of the trust.”

As so amended, the defendants and each of them admit the allegations of Paragraph 4.

2. Paragraph 17 of the complaint is amended so that it reads:

“17. The United States income taxes amounting to \$570,957.86 collected from the plaintiff as trustee under the aforesaid trust by the defendant James G. Smyth as Collector of Internal Revenue were erroneously and illegally collected and are refundable to the plaintiff. The net gain or profit taken into account on the sale of the trust securities made by the plaintiff as trustee in 1946 amounting to \$1,141,915.72 was not subject to United States income taxes, but, on the contrary, such gain was expressly freed from the burden of and made exempt from any and all United States taxes under the provisions of Section 22 (b) (7) of the Internal Revenue Code which exempts income of any kind to the extent required by any treaty of the United States, including the aforesaid Treaty between the Government of the United States and the Govern-

ment of the United Kingdom, proclaimed by the President of the United States on July 30, 1946.

Article XIV of the aforesaid Treaty provides:

“ ‘A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States taxes on gains from the sale or exchange of capital assets.’ ”

As so amended, the defendants and each of them deny the allegations of Paragraph 17, except that it is admitted that Article XIV of the aforesaid Treaty contains provisions as alleged in Paragraph 17.

3. Paragraph 19 of the complaint is amended so that it reads:

“19. At at times material to this action, under the laws of the United Kingdom gains on the sale of capital assets, including gains on the sale by a trustee of an express trust of securities constituting the corpus of such trust, were and are exempt from any income taxes imposed by the United Kingdom, except in the narrow case where the seller is a ‘trader’ in securities not here applicable. In each of the several Articles of the Income Tax Convention between the United States and the United Kingdom, full reciprocity in treatment is accorded residents of the United Kingdom realizing income from United States sources and residents of the United States realizing income from United King-

dom sources, notwithstanding the differences in the systems of taxation in the United States and in the United Kingdom. The generally accepted meaning of the word 'exempt' in the United States and in the United Kingdom, as defined in American and British standard dictionaries of the English language, is to free from, as from some liability or burden, or not made subject to a charge, payment or tax."

As so amended, the defendants and each of them deny the allegations of Paragraph 19.

March 22, 1955.

/s/ HOWARD J. FINN,

/s/ THEODORE R. MEYER,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

/s/ MONTGOMERY B. ANGELL,

DAVIS, POLK, WARDWELL,
SUNDERLAND & KIENDL,
Of Counsel.

/s/ LLOYD H. BURKE,

United States Attorney,
Attorneys for the Defendants.

So Ordered.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed March 22, 1955.

[Title of District Court and Cause.]

MEMORANDUM FOR JUDGMENT

Plaintiff, as trustee of a testamentary trust, seeks the refund of capital gains taxes paid under protest. The facts are not in dispute. Jurisdiction is necessarily invoked under 28 U.S.C. Section 1346 (a) (1).

In 1946 plaintiff trustee sold part of the property constituting the corpus of the trust at a profit. Defendant Collector of Internal Revenue collected a capital gains tax based on the gain resulting from that sale of trust property. Throughout 1946 all the life beneficiaries of the trust and all the remaindermen of the trust were residents of the United Kingdom of Great Britain and Northern Ireland; therefore plaintiff claims an exemption from United States capital gains tax, by virtue of Article XIV of the Convention between the United States of America and the United Kingdom of Great Britain and Ireland signed April 16, 1945, effective as of January 1, 1945, relating to income taxes (60 Stat. [part 2] 1377), which provides:

“A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.”

The defendant does not contend that any of the beneficiaries of the trust are engaged in trade or business in the United States. The defendant does

contend that the capital gain which resulted from the sale of trust property in 1946 was not the income of the beneficiaries and remaindermen of the trust, but was income that was taxable to the trustee; the trustee, a California corporation, is not a resident of the United Kingdom and does not qualify for the exemption of Article XIV of the tax convention. This contention of the defendant is based upon a distinction that has long been made in the scheme of taxation of trusts in the United States; that is, that if trust income is currently distributable to the beneficiaries, it is treated as their income and taxable to them, but if trust income is not currently distributable to the beneficiaries under the trust instrument, it is the trustee's income and is taxable to the trustee. One of the leading cases on this doctrine is *Freuler v. Helvering*, 291 U.S. 35, 41, wherein the Supreme Court said this with regard to the sections of the Internal Revenue Act dealing with the taxation of trusts:

“This [the net income of the trust] the fiduciary may be required to accumulate; or, on the other hand, he may be under a duty currently to distribute it. If the latter, then the scheme of the Act is to treat the amount so distributable, not as the trust's income, but as the beneficiary's.”

The Court held, at page 42:

“The test of taxability to the beneficiary is not receipt of income, but the present right to receive it.”

This rule has been followed in numerous later cases. In *Hubbell v. Helvering*, 8th Cir., 70 F. 2d 668, 669, cert. denied, 283 U.S. 840, the court described the holding of the *Freuler* case in this way:

“That decision determines that the entire net income of the trust estate is taxable; that, in determining such net income, the trustee is authorized to make the appropriate deductions allowed by law to other taxpayers; that so much of such net income as is distributable to the beneficiaries is taxable to them; that whether a part of such income is so distributable depends upon the terms of the instrument creating the trust * * *”

And in *Bryant v. Commissioner*, 4th Cir., 185 F. 2d 517, 519, the court said:

“The test of taxability is not the receipt of income but the right to receive it. *Freuler v. Helvering*, 291 U.S. 35, 54 S.Ct. 308, 78 L.Ed. 634, and the right to receive the income of a trust depends upon the terms of the trust instrument and governing state law.” (Citations omitted.)

See also *Peck v. Commissioner*, 2d Cir., 77 F. 2d 857, 858, cert. denied, 296 U.S. 625; *Saulsbury v. United States*, 5th Cir., 199 F. 2d 578.

Under the trust instrument in the case at bar, capital gains are not currently distributable to the beneficiaries; therefore the defendant argues that capital gains are income to the trustee, and are taxable because the trustee is not entitled to the exemption of the tax convention. The defendant

agrees that if capital gains were currently distributable to the beneficiaries under the terms of this trust, such capital gains would be the income of the beneficiaries, and would be exempt from United States tax under the tax convention because the beneficiaries are residents of the United Kingdom.

Plaintiff attempts to meet this main defense by arguing that the United Kingdom tax convention was intended by the contracting parties to override the provisions of domestic law upon which the defendant relies. These provisions are found in Treasury Department regulations made pursuant to Section 62 of the Internal Revenue Code of 1939 (26 U.S.C., 1952 Ed., Sec. 62). These regulations may be found in T.D. 5569, 1947-2 Cum. Bull. 100, 109, 12 F.R. 1236. Plaintiff makes several points in support of its argument, but none of them are persuasive.

Plaintiff argues that Article XIV of the tax convention should be construed to exempt capital gains resulting from the sale of property "in beneficial ownership." In this connection plaintiff emphasizes that the ordinary income of the trust which is distributable to the beneficiaries is less than it would be if the corpus of the trust were not depleted to the extent of the capital gains tax collected by the defendant. But this is the equivalent of arguing that if any burden of a capital gains tax falls upon a resident of the United Kingdom, the exemption of the tax convention applies. There is no warrant in the convention for such an interpretation.

Plaintiff also seeks comfort in dictionary definitions of the word "exempt" to the effect that the word means "to free from the burden of." Here, again, plaintiff would have this Court construe the exemption of Article XIV to apply to any resident of the United Kingdom on whom falls any of the burden of a United States capital gains tax. There is nothing in the tax convention to justify that construction of the word "exempt," and if that was the intention of the parties to the compact, they could easily have so provided.

Plaintiff also contends that the aim of the parties to the tax convention was equality of treatment in the taxation by each party of the nationals of the other party. From this plaintiff argues that because an American beneficiary of a trust held by a United Kingdom trustee would be wholly free from any burden of United Kingdom capital gains tax, that it must have been intended by the parties to the tax convention that in the reverse but like situation of United Kingdom beneficiaries of a trust with an American trustee, such as in the case at bar, that the beneficiaries should be freed from any burden of the United States capital gains tax. But the reason that an American beneficiary of a trust held by a United Kingdom trustee would be free from any burden of United Kingdom capital gains tax is, that there is no capital gains tax in the United Kingdom. One could just as well argue that a resident of the United Kingdom who held stock in an American corporation should be free

from the burden of United States capital gains taxes on sales of corporate property, because an American stockholder in a United Kingdom corporation would not suffer the burden of a United Kingdom capital gains tax on sales of corporate property. This Court is not convinced that perfect equality of tax treatment was accomplished or intended to be accomplished by the tax convention on which plaintiff relies. Tax conventions are the product of long negotiations between the contracting parties. These negotiations usually consist of a series of tax concessions made by each party to the convention; therefore complete reciprocity is seldom possible.

The provision of the tax convention on which plaintiff must base its whole case, provides in substance that a resident of the United Kingdom shall be exempt from United States capital gains tax. No mention is made of trusts. Plaintiff urges this Court to consider the rule of construction of treaties referred to by the Supreme Court in *Factor v. Laubenheimer*, 290 U.S. 276, 293-294:

“* * * if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.” (Citations omitted.)

But this Court does not agree that Article XIV fairly admits of the construction that income ordinarily taxable to a trustee is to be taxed to bene-

ficiaries. The basic issue here is, who is the taxpayer? It is perfectly reasonable for the defendant to follow United States law in making that initial determination; there is nothing in the tax convention that would warrant the defendant in looking elsewhere for guidance on that point.

Plaintiff has failed to overcome a basic obstacle to recovery in this suit; namely, plaintiff has failed to show that the capital gain which was taxed here, represented income to the beneficiaries of the trust, who are the only persons who can qualify for an exemption under the convention. Plaintiff has not shown anything in the tax convention that requires this Court to find that the parties to the convention intended to treat the trustee's income as that of the beneficiaries in the case of capital gains.

The case of *Lewenhaupt v. Commissioner*, 20 T.C. 151, affirmed per curiam, 221 F. 2d 229 (Cir. 9), is not controlling here because of difference in the language of the Swedish-American Convention construed in that case, and the language of the United Kingdom - American Convention construed in this case.

It is the conclusion of this Court that the capital gain involved in this case represented income to the trustee, and that the trustee does not qualify for any exemption from taxation on that income.

The defendant has moved to strike stipulation No. 4, and portions of stipulation No. 5, upon the ground that they were irrelevant and immaterial.

Ruling on these motions was reserved. The stipulations are relevant and material to plaintiff's theory of the case, and the motion to strike will, therefore, be denied.

Judgment is awarded to defendant, with his costs of suit incurred herein. Counsel for defendants shall present findings, conclusions and a judgment.

Dated: June 4, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case was tried by this Court without the intervention of a jury. Plaintiff was **represented** by its counsel, Howard J. Finn; Theodore R. Meyer; Brobeck, Phleger & Harrison, San Francisco, California; Montgomery B. Angell, David A. Lindsay, and Davis, Polk, Wardwell, Sunderland & Kiendl, New York City, and the defendants were represented by their counsel, H. Brian Holland, Assistant Attorney General; Andrew D. Sharpe, Homer R. Miller, Attorneys, Department of Justice, and Lloyd H. Burke, United States Attorney, and Lynn J. Gillard, Assistant United States Attorney.

This Court having heard the evidence and having considered the briefs and arguments of counsel and being duly advised in the premises, makes the following findings of fact and conclusions of law, pursuant to Rule 52, Federal Rules of Civil Procedure for District Courts of the United States.

Findings of Fact

1. Plaintiff instituted this action against the defendants to recover \$570,957.86, plus interest, income taxes for the year 1946. The defendants filed an answer denying liability.

2. The sole issue in the case was whether or not the plaintiff was exempt from income taxes on long-term capital gains on the sale of securities, the proceeds of which sale were not distributed as income to the beneficiaries of the trust under which plaintiff was trustee pursuant to California law, but became part of the principal of the trust, where all of the beneficiaries of the trust were aliens residing in the United Kingdom, exemption being claimed by the plaintiff-trustee in view of the provisions of Article XIV of the Income Tax Convention between the United States and the United Kingdom which provides that residents of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States income taxes on capital gains.

3. The plaintiff, American Trust Company, now is and at all times herein mentioned has been a corporation organized under the laws of California,

with its principal place of business located in San Francisco, California. As such it is and has been authorized to act as trustee of express trusts, and since February 28, 1938, it has been trustee of a certain testamentary trust created by Harry L. Tevis, who died on July 19, 1931.

4. Defendant James G. Smyth was at all times since May 14, 1945, and until September 27, 1951, the Collector of Internal Revenue for the First District of California. On September 27, 1951, said defendant retired from office as Collector of Internal Revenue and is not now in such office, but is still alive and resides within the territorial jurisdiction of this Court.

5. During the year 1946, the plaintiff as trustee of the Tevis trust sold certain shares of the corporate stock of Kern County Land Company, a corporation, and certain other securities which comprised part of the corpus of such trust, and on such sales realized gross long-term capital gains of \$2,302,733.54 and net long-term capital gains taken into account in the aggregate sum of \$1,141.915.72. Under the provisions of California law these gains and profits were not distributable to the life beneficiaries of the trust, but the entire proceeds of the sales were required to be and were retained by the trustee as part of the corpus of the trust.

6. On or about March 14, 1947, plaintiff as trustee of the said trust duly filed a federal fiduciary income tax return for the calendar year 1946

with the Collector of Internal Revenue for the First District of California, in which were reported the transactions described in the foregoing paragraph. Thereafter the defendant James G. Smyth as Collector of Internal Revenue collected from the plaintiff and the plaintiff paid to the said defendant as Collector of Internal Revenue the sum of \$570,957.86 reported in said return and paid in quarterly installments as follows:

| | |
|-------------------------|--------------|
| March 14, 1947 | \$142,739.48 |
| June 9, 1947 | 142,739.46 |
| September 8 | 142,739.46 |
| December 11, 1947 | 142,739.46 |

7. Thereafter on or about November 28, 1949, the plaintiff as trustee of the aforesaid trust duly filed a claim for refund with the Commissioner of Internal Revenue, contending that the sum of \$570,957.86 referred to in the foregoing paragraph was erroneously and illegally collected by the defendant James G. Smyth as Collector of Internal Revenue. The said claim for refund set forth the same grounds for refund as are alleged in the complaint herein.

8. On or about April 25, 1952, the Commissioner of Internal Revenue mailed to plaintiff by registered mail a notice of the disallowance in full of the plaintiff's claim for refund. No part of said \$570,957.86 or interest thereon has ever been refunded to the plaintiff.

9. On July 19, 1931, Harry L. Tevis, late of the

County of Santa Clara, State of California, died testate. Pursuant to proceedings duly had and taken in the Superior Court of the State of California in and for the County of Santa Clara, on August 19, 1931, the Superior Court duly made and rendered its order, admitting the will of the decedent, Harry L. Tevis, to probate, and on July 26, 1935, duly made and rendered a final decree of distribution ordering the distribution by the executors to the trustees of the several trusts created under the will of Harry L. Tevis, and such a distribution to such trustees was duly made.

10. Harry L. Tevis died unmarried and without children. Under his will, decedent bequeathed certain specific legacies in cash to named individuals, created four trusts in equal amount for each of the four sons of his brother, William S. Tevis, and a trust in equal amount for one Edwin Lee Dunlap. By paragraph Seventh of his will all the rest and residue of any and all property owned by decedent at his death was bequeathed as follows:

(a) One-half to the decedent's niece, Florence Fermor-Hesketh;

(b) All of the remaining one-half not disposed of as set forth in subparagraph (c) below in trust for the children of Florence Fermor-Hesketh born before decedent's death, with remainders over, the terms of said trust being set forth in paragraph 11 of the plaintiff's complaint and admitted in the defendants' answer;

(c) Out of the one-half not disposed of to Florence Fermor-Hesketh, a named sum in trust for the decedent's brother, William S. Tevis, with remainders over to decedent's four nephews, the sons of his brother William.

11. In his will, Harry L. Tevis named one Fred T. Elsey as trustee of each of the trusts set up under the will and named the plaintiff as successor trustee. Said Fred T. Elsey duly qualified and served as trustee until February 28, 1938, when he ceased to act as trustee and pursuant to proceedings duly had taken in the Superior Court for the County of Santa Clara, California, said Court issued an order duly made and rendered, confirming the appointment of the plaintiff as successor trustee of the trusts set up under paragraph Seventh, subdivision (b), of the said will of Harry L. Tevis, and since then plaintiff has been the duly qualified and acting trustee of such trust, and has held and possessed the corporate shares and securities constituting the corpus of such trust, including the shares and securities sold within the year 1946 as set forth in paragraph 5 above.

12. The said final decree of distribution made and rendered by the said Superior Court on July 26, 1935, incorporated the said will of Harry L. Tevis and distributed a portion of the property of said decedent in accordance with subparagraph (b) of paragraph Seventh of said will. Said subparagraph (b) of paragraph Seventh reads as follows:

All that part of the remaining one-half thereof which is not disposed of by the provisions of subdivision (c) of this paragraph (Seventh) I give, devise and bequeath to Fred T. Elsey, as Trustee, upon the uses and trusts, and for the purposes and with the powers hereinafter specified, namely:

To receive the rents, issues and profits and income of the trust estate, and to pay the net rents, issues, profits and income therefrom in equal shares to the children of my niece Florence Fermor-Hesketh born before my death, or to the survivor or survivors of them, during their lives, respectively.

If any of the said children of my said niece, Florence Fermor-Hesketh shall have predeceased me leaving issue living at my death, my said trustee shall forthwith transfer, pay over and deliver to the said issue of each of said children who predeceases me (and there is hereby given, devised and bequeathed to the issue living at my death of each of said children of my said niece who shall predecease me) one of as many portions of the said corpus of the trust aforesaid as shall be ascertained by adding together the number of the children of my said niece living at my death and the number of her children who predecease me leaving issue living at my death.

If after my death any of the said children of my niece born before my death shall die leaving issue, then there shall be transferred, paid over and delivered to such issue (and in that event there is

hereby given, devised and bequeathed to such issue) one of as many parts of the aforesaid trust fund as shall be ascertained by adding together the number of the children of my niece living at my death and the number of her children who predecease me leaving issue living at my death.

If upon the death of the last of the children of my said niece born before my death and after the issue of each of them who left issue either living at my death, or born thereafter, shall have received the portion of the trust fund which it is hereinabove provided shall be delivered to them, there shall be any overplus in the hands of such trustee, said overplus shall be then transferred, paid over and delivered (and, in that event, there is hereby given, devised and bequeathed) to the then living issue of the said children of my said niece in equal shares per capita and not per stirpes.

13. By paragraph Tenth of the will of Harry L. Tevis it was provided that:

The word "children" wherever used in this will means and includes only the first generation of direct lineal descendants. The word "issue" wherever used in this will means and includes direct lineal descendants of all generations.

14. Florence Fermor-Hesketh, the decedent's niece, has had five children, all of whom were born prior to the decedent's death, namely Thomas S. Fermor-Hesketh, born October 7, 1910; Louise Fermor-Hesketh Stockdale, born December 15,

1911; Flora Fermor-Hesketh Lawson, born February 23, 1913; Frederick Fermor-Hesketh, born April 18, 1916; and John Brekenridge Fermor-Hesketh, born March 7, 1917. Thomas S. Fermor-Hesketh died on June 21, 1937, without issue. The decedent's niece, Florence Fermor-Hesketh, had no child or children who predeceased the decedent, and at the time of the decedent's death no child of Florence Fermor-Hesketh had predeceased the decedent leaving issue living at the decedent's death.

15. During the calendar year 1946 the living direct lineal descendants of the children of Florence Fermor-Hesketh were: the two children of Louise Fermor-Hesketh Stockdale, namely: Ann Louise Stockdale, born May 30, 1938, and Thomas Stockdale, born January 7, 1940; and the three children of Florence Fermor-Hesketh Lawson, namely: John Baring, born August 16, 1934, James Baring, born August 16, 1938 (sons by a former marriage), and Arabella Ann Lawson, born August 14, 1946. All of these direct lineal descendants were and are unmarried.

16. Thomas S. Fermor-Hesketh until his death and each of the four living children of Florence Fermor-Hesketh born prior to the decedent's death named in paragraph 14 above and each of the children of such children named in paragraph 15 above were at the date of the decedent's death and have continuously have been since such death residents of the United Kingdom of Great Britain and

Ireland, and were not engaged in trade or business in the United States.

17. The four living children of Florence Fermor-Hesketh and the grandchildren of Florence Fermor-Hesketh named in paragraphs 14 and 15 above were all born, domiciled in and subjects and residents of the United Kingdom, and since the dates of their respective births they have continued to be domiciled in and are subjects and residents of the United Kingdom, and they have lived continuously in said United Kingdom.

18. Article XIV of the Income Tax Convention between the United States of America and the United Kingdom, proclaimed by the President of the United States on July 30, 1946, and effective January 1, 1945 (60 Stats. 1377), provides as follows:

“A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States taxes on gains from the sale or exchange of capital assets.”

19. Under the terms of the Harry L. Tevis trust under which plaintiff was acting as trustee and under the laws of the State of California, the proceeds from the sales of the securities involved herein were required to be and were retained as part of the corpus of the trust, and income taxes, if any, arising from such sales were chargeable against the corpus of the trust.

20. The securities comprising part of the corpus of the Tevis trust which were sold in 1946 by the plaintiff as trustee of such trust, constituted capital assets. The capital gains realized on the sale of such securities held for more than six months amounted to \$2,302,733.54, and, after adjustments on account of certain long and short term capital losses in respect to other securities sold and the application of the capital loss carried over from 1945, the net capital gain taken into account on account of such sales amounted to \$1,141,915.72.

21. The sales made by the plaintiff as trustee in 1946 consisted mainly of 57,200 shares of Kern County Land Company stock which sales the trustee realized \$2,574,000 in cash.

22. The corpus of the trust created under paragraph Seventh of the will of Harry L. Tevis constituted the portion of the property of the decedent distributed to the trustee of such trust under the final decree of the Superior Court of Santa Clara County dated July 26, 1935.

23. The children of Florence Fermor-Hesketh set forth in paragraph 14 herein and the grandchildren of Florence Fermor-Hesketh set forth in paragraph 15 herein were in 1946 and always have been citizens of the United Kingdom of Great Britain and Northern Ireland, and were not in 1946 and never have been citizens of the United States; such children and grandchildren were in 1946 and always have been resident in the United Kingdom

for the purposes of the United Kingdom income tax, and were not in 1946 and never have been resident in the United States for the purposes of the United States income tax; such children and grandchildren were not and never have been engaged in trade or business in the United States; and such children and grandchildren did not have in 1946 and never have had a permanent establishment situated within the United States.

24. The present Fermor-Hesketh family grew out of the union in 1846 of two old English families, namely, the Hesketh family and the Fermor family. In 1946 Lady Anna Maria Arabella Fermor married Sir Thomas George Hesketh, and by Royal License dated November 8, 1867, Sir Thomas Hesketh and his son, Thomas George, were authorized to take the surname of Fermor, and from such date their descendants have borne the name of Fermor - Hesketh. Florence Former - Hesketh was born in California on December 31, 1881, the daughter of the late John Witherspoon Breckenridge of California. In 1909 she was married to Sir Thomas Fermor-Hesketh, Baronet, an English citizen and resident in England and since her marriage she has been a citizen of the United Kingdom and resides in Northhamptonshire, United Kingdom. Her husband died on July 20, 1944.

Louise Fermor-Hesketh Stockdale her daughter was born in England on December 15, 1911, was educated in England and has lived all of her life in England. On July 24, 1937, she married Edmund

Villiers Minshull Stockdale, a citizen of the United Kingdom whose family has always resided in Northamptonshire, and who is a banker and stockbroker, a Justice of the Peace and a Sheriff in the City of London. All of his relatives are resident in England and his close friends and the friends of his wife are all English people. The two now occupy an estate in Hampshire comprising substantial land holdings and their three children are now being educated in English schools.

Flora Fermor-Hesketh Lawson was born in England on February 23, 1913. She was educated in England and has lived all of her life in England. In 1934 she married Rupert Baring, Baron Revelstoke, a citizen of the United Kingdom and the two sons of this marriage are now being educated at Eton College. The Revelstokes lived in London until Flora Fermor-Hesketh Lawson divorced her husband in 1944. Baron Revelstoke has never remarried. The two sons are the sole heirs of their father. Following the divorce, Flora Fermor-Hesketh Lawson married Commander Arnold Derek Arthur Lawson, a citizen of the United Kingdom who has always resided in England, and she has had two daughters by this marriage both born in London and who have always lived in England. Since their marriage, the Lawsons have acquired substantial properties and a residence in Buckinghamshire, England. Mr. Lawson was a former solicitor in London, but has now retired. The close friends and relatives of Baron Revelstoke and of the Lawsons all reside in England.

Frederick Fermor-Hesketh was born in England in 1916, has always resided in England and was educated at schools and colleges in England. In 1949 he married Christian Mary McEwen, a citizen of the United Kingdom and a resident of England. The three children by this marriage have always lived in England.

John Breckenridge Fermor-Hesketh was born in England in 1917 and since his birth has been a citizen of the United Kingdom and a resident of England. He was educated in schools and colleges in England, and in 1946 he married Patricia Macaskie Cole, an English citizen and a resident of England. They have no children. Most of the friends of Mr. and Mrs. John Breckenridge Fermor-Hesketh reside in England. Since 1946 Mr. Fermor-Hesketh, sometimes accompanied by his wife, has spent two or three months each year in California looking after certain of his mother's affairs.

With the exception of John Breckenridge Fermor-Hesketh, the business connections of the members of the Fermor-Hesketh family noted above are almost wholly limited to the United Kingdom and the close friends and members of the Fermor-Hesketh family reside in and are citizens of the United Kingdom. John Breckenridge Fermor-Hesketh has some business interests and friends in California. The bulk of his business connections are in England, and his close friends reside in and are citizens of the United Kingdom.

25. Following the sales of the securities constituting part of the Tevis trust as made by the plaintiff in 1946 as trustee of such trust, the plaintiff as trustee reinvested the cash proceeds (after setting aside an amount sufficient to pay the expenses of and the taxes on such sales) in securities which were held as part of the corpus of the trust fund. The average rate of return on the securities purchased out of such proceeds of sale for the succeeding seven year period 1947-1953, inclusive, was approximately 3.84%.

26. During 1944 and 1945 and at all times thereafter, the United Kingdom income tax and the United Kingdom surtax were charged upon annual income derived by any person residing in the United Kingdom from any source whatever, and upon annual income derived by any person from sources within the United Kingdom whether or not the resident was a British subject or a resident of the United Kingdom.

27. During 1944 and 1945 and at all times thereafter, under the system of income taxation in the United Kingdom of Great Britain and Northern Ireland a charge or tax is imposed upon income but not upon realized accretions of capital; a resident or non-resident individual, a corporation or a trustee of an express trust who realizes gains or profits on the sale of securities or real and other property in the United Kingdom is not chargeable with income tax (including surtax), the excess profits tax or the national defense contribution (in 1946 re-

named the profits tax) unless what is done is not merely a realization or change in investment but an act done in what is truly the carrying on or carrying out of a business; subject to the foregoing, an accretion of capital is not taxable merely because the original capital was invested in the hope and expectation that it would rise in value, and if it does rise in value the realization on a sale does not result in taxable income.

28. If the sales made by the plaintiff as trustee in 1946 had been made by a trustee of a trust created in the United Kingdom in terms of the trust involved in these proceedings they would have been in realization on and changes of investments within the provisions of the preceding paragraph herein and the gains and profits realized thereon would not have been subject to the United Kingdom income tax.

29. When the United Kingdom Tax Convention was entered into, under the United Kingdom Tax system there was an income tax (charged at a standard rate), a surtax, an excess profits tax and a so-called national defense contribution. During 1944 and 1945, under the United Kingdom system of taxation corporate profits arising to a United Kingdom corporation were subject to income tax at a standard rate of 50% and a national defense contribution of 5% (unless the excess profits tax on the corporate profits exceeded the national defense contribution) and such taxes were paid to the United Kingdom Treasury. When the corporation later

declared a dividend to its stockholders it was entitled to deduct therefrom an amount equal to tax at the standard rate on the amount of the dividend. A shareholder or a stockholder was not assessable to tax at the standard rate on the dividend, but was required to pay the surtax on the full amount of the dividend (including the amount of the standard tax attributable to the dividend) except that after the effective date of the Income Tax Convention between the United Kingdom and the United States a resident of the United States was exempted from the United Kingdom surtax in terms of Article VI (2) of the Convention.

30. During 1944 and 1945 the United Kingdom tax at the standard rate in respect of royalties from mines and other natural resources and rentals from real property derived from sources within the United Kingdom was imposed on the amount of such royalties and rentals after relevant deductions and allowances at 50%.

31. Prior to the United Kingdom Income Tax Convention, credits against the United Kingdom tax on account of foreign taxes paid were not allowed under United Kingdom law, except the following case which is not a case of tax credit, namely where income arises to a person resident in the United Kingdom from securities (other than Dominion or Colonial securities) out of the Kingdom, or from stocks or shares or certain other forms of possessions (other than Dominion or Colonial) out of the Kingdom and chargeable to income tax at the

standard rate though not remitted to this Kingdom, a deduction was allowed in computing the amount of the chargeable income of any sum which had been paid in respect of income tax in the place where the income had arisen. As a matter of judicial decision it has been held that to be so deductible the foreign tax must have been a tax on the income charged to the United Kingdom income tax. This however is not to be considered as a credit of tax against tax.

32. During 1944 and 1945 the United Kingdom did not impose a tax in respect of dividends and interest paid by a United States corporation to a non-resident of the United Kingdom (including residents of the United States), even though such United States corporation derived income from sources within the United Kingdom.

33. During 1944 and 1945 the United Kingdom did not impose taxes upon the accumulated or undistributed profits or surplus of a United States corporation except in the case of certain tax avoidance schemes.

Conclusions of Law

1. The capital gains involved in this case represent taxable income to the plaintiff herein and the plaintiff-trustee does not qualify for any exemption from taxation on that income.

2. The plaintiff is not entitled to recover in this action.

3. The complaint should be dismissed with costs taxed to the plaintiff.

Entered this 30th day of July, 1956.

/s/ OLIVER J. CARTER,
Judge.

Affidavit of Mail attached.

Lodged June 14, 1956.

[Endorsed]: Filed July 30, 1956.

In the United States District Court for the North-
ern District, of California, Southern Division

No. 33507

AMERICAN TRUST COMPANY, a Corporation,
as Trustee,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Reve-
nue, and the UNITED STATES OF AMER-
ICA,

Defendants.

JUDGMENT

This cause came on for hearing before this Court without the intervention of a jury on March 22, 1955. Briefs were submitted by counsel on both sides and the case was argued orally before this Court on September 16, 1955.

The Court having heard the evidence and having considered the briefs and arguments of counsel, and having filed its findings of fact and conclusions of law herein in which it found the facts as stipulated by the parties and determined the law in favor of the defendants herein,

It Is Therefore Considered, Ordered and Adjudged, that judgment should be and hereby is entered in favor of the defendants James G. Smyth, Collector of Internal Revenue, and the United States of America, and that the plaintiffs complaint should be dismissed with costs taxed according to law.

Dated this 30th day of July, 1956, at San Francisco, California.

/s/ OLIVER J. CARTER,
Judge.

Lodged June 14, 1956.

[Endorsed]: Filed and entered July 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that American Trust Company, appellant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 30, 1956.

/s/ HOWARD J. FINN,

/s/ THEODORE R. MEYER,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Appellant.

/s/ MONTGOMERY B. ANGELL,

DAVIS, POLK, WARDWELL,
& KIENDL,

Of Counsel.

[Endorsed]: Filed September 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Answer.

Stipulation No. 2.

Memorandum for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of October, 1956.

[Seal] C. W. Calbreath,
Clerk.

By /s/ MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 15339. United States Court of Appeals for the Ninth Circuit. American Trust Company, a Corporation, Appellant, vs. James G. Smyth, Collector of Internal Revenue and United States of America, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15339

AMERICAN TRUST COMPANY, a Corporation,
as Trustee,

Appellant,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
and UNITED STATES OF AMERICA,

Appellees.

STATEMENT OF POINTS

Pursuant to Rule 17(6) of this Court, appellant American Trust Company hereby files a concise statement of the points on which it intends to rely and a designation of all of the record which is material to the consideration of the appeal.

Statement of Points

1. The findings do not support the judgment, and therefore the Court erred in entering said judgment.
2. The findings compel a judgment for appellant as prayed in the Complaint, and therefore the Court erred in failing to enter such a judgment.

Dated: October 29, 1956.

/s/ THEODORE R. MEYER,

An Attorney for Appellant
American Trust Company.

[Endorsed]: Filed October 29, 1956.

No. 15339

IN THE
United States Court of Appeals
For the Ninth Circuit

AMERICAN TRUST COMPANY, a Corporation,
Plaintiff-Appellant,
vs.

JAMES G. SMYTH, Collector of Internal Revenue,
and UNITED STATES OF AMERICA,
Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

HOWARD J. FINN,
THEODORE R. MEYER,
BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff-Appellant.

MONTGOMERY B. ANGELL,
DAVID A. LINDSAY,
DAVIS POLK WARDWELL SUNDERLAND
& KIENDL,
of Counsel.

FILED

JAN 30 1957

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No. 15339

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN TRUST COMPANY, a Corporation,
Plaintiff-Appellant,
VS.

JAMES G. SMYTH, Collector of Internal Revenue,
and UNITED STATES OF AMERICA,
Defendants-Appellees.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

This is an action to recover Federal income taxes erroneously and illegally collected from plaintiff-appellant American Trust Company. There is no factual dispute; only legal questions are presented on this appeal.

Jurisdiction

The action was instituted in the United States District Court for the Northern District of California, Southern Division, and was tried before the Honorable Oliver J. Carter without a jury (R. 31).

The Complaint (R. 3) asserts three claims for relief, each of which is concerned with the same tax payments. All three claims arise under Section 22(b)(7) of the Internal Revenue Code, under the Income Tax Convention between the United States and the United Kingdom of Great Britain and Northern Ireland, 60 Stat. 1337, and under Sections 322, 3771 and 3772 of the Internal Revenue Code.¹

The First Claim for Relief (R. 3) names as defendant James G. Smyth, a former Collector of Internal Revenue. The trial court had jurisdiction thereof by virtue of 28 U. S. C. §§ 1331 and 1340. The Second and Alternative Claim for Relief (R. 14) names as defendant the United States of America. This claim is in substitution of the claim against Smyth, who had retired and was not in office at the institution of the action (*Lowe Bros. Co. v. U. S.*, 304 U. S. 302, 305 (1938)), and the trial court had jurisdiction thereof by virtue of 28 U. S. C. §§ 1331, 1340 and 1346. The Third and Alternative Claim for Relief (R. 15) also names the United States as defendant, and the trial court had jurisdiction thereof by virtue of 28 U. S. C. § 1346.

From a judgment in favor of defendants (R. 49) entered on the trial court's findings of fact and conclusions of law (R. 31), plaintiff appealed (R. 50). This Court has jurisdiction to review the judgment under 28 U. S. C. §§ 1291 and 1294(1).

Statement of the Case

The plaintiff in 1946 was and still is the duly qualified trustee of a certain testamentary trust created under the will of Harry L. Tevis, late of the County of Santa Clara, California, who died testate on July 19, 1931 (R. 32). In 1946 the plaintiff, as such trustee, sold part of the property constituting the corpus of the trust at a profit (R. 33). It

¹ All references to the Internal Revenue Code are to the Internal Revenue Code of 1939 unless otherwise indicated.

duly filed a Federal income tax return, reporting the sale and the amount of profit and paid the Collector of Internal Revenue for the First District of California capital gain taxes of \$570,957.86 (R. 33-4). Thereafter, a claim for refund was filed with the Commissioner of Internal Revenue, asserting that such taxes were erroneously and illegally collected (R. 34). The claim for refund was denied in full and this suit followed (R. 34).

Throughout 1946 all the life beneficiaries of the trust and all the remaindermen of the trust were residents of the United Kingdom of Great Britain and Northern Ireland and were not engaged in trade or business in the United States (R. 39-40, 41).

The question raised below and here presented is whether the capital gains here involved are exempt from United States tax under Article XIV of the United Kingdom Income Tax Convention as implemented by Section 22(b)(7) of our Internal Revenue Code.

The Court below held that capital gains realized by the trustee of a United States trust when currently distributable are exempt under the United Kingdom Convention, but that the capital gains when held for future distribution are not exempt (R. 24, 48-9).

The Statute, Treaty and Regulations

Section 22(b)(7) of our Internal Revenue Code provides broadly:

“(b) Exclusions from gross income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * *

(7) Income exempt under treaty.—Income of any kind, to the extent required by any treaty obligation of the United States.”

The exemption here claimed arises under the Income Tax Convention with the United Kingdom and depends upon a consideration of the Convention in its entirety. In particular, Article XIV provides:

“A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.”

The official text of the treaty is printed in full in our Appendix separately bound. We also print in our Appendix the material parts of Sections 161 and 162 of the Revenue Code of 1939 as they appeared in 1946, upon which the Court below mainly relied in reaching its decision.

Treasury Decision 5569 comprises the Commissioner's Regulations applicable to the treaty. 1947-2 Cum. Bull. 100, 109. Section 7.519, subparagraph (c), of T. D. 5569 provides:

“(c) *Beneficiaries of an Estate or Trust.*—A nonresident alien who is a resident of the United Kingdom and who is a beneficiary of a domestic estate or trust, shall be entitled to the exemption, or reduction in the rate of tax, as the case may be, provided in Articles VI, VII, VIII, IX and XIV of the convention with respect to dividends, interest, royalties, natural resource royalties, rentals from real property and capital gains to the extent such item or items are included in his distributive share of income of such estate or trust if he is taxable in the United Kingdom on such income and is not engaged in trade or business in the United States through a permanent establishment.”

The United Kingdom Convention does not authorize the issuance of interpretive regulations by either of the contracting parties. The above quoted regulation was issued under Section 62 of our domestic Internal Revenue Code, which authorizes the Commissioner generally to prescribe regulations “for the enforcement of this Chapter”, i.e., Chapter 1 of our Internal Revenue Code. 1947-2 Cum. Bull. 109.

Specification of Errors

The Court below erred in the following particulars:

1. In concluding that the capital gains involved in this case represent taxable income to the plaintiff herein and that such gains do not qualify as exempt from taxation.

2. In concluding that plaintiff is not entitled to recover in this action.

3. In concluding that the complaint should be dismissed.

4. In entering judgment in favor of defendants.

5. In failing to enter a judgment for plaintiff as prayed in the Complaint.

Statement of Facts

The plaintiff, American Trust Company, is a California corporation with its principal place of business in San Francisco. Since February 28, 1938, it has been and still is the trustee of the Tevis trust created under the will of Harry L. Tevis (R. 33).

The will of Harry L. Tevis was duly admitted to probate on August 19, 1931, and on July 26, 1935, the Superior Court of the County of Santa Clara duly made and rendered a final decree of distribution ordering the distribution by the executors to the trustees of the trusts created under the will, including the trust here involved, and such a distribution to the trustees was duly made. The corpus of the trust here involved constituted a portion of the property distributed to the trustee of such trust under the final decree of July 26, 1935 (R. 35, 41).

Harry L. Tevis, the decedent, died unmarried and without children. Under his will he bequeathed certain specific legacies in cash to named individuals, created four

trusts in equal amounts for each of the four sons of his brother, William S. Tevis, and a trust in equal amount for one Edwin Lee Dunlap. By paragraph Seventh of his will (R. 35-8), all the rest and residue of any and all property owned by the decedent at his death was bequeathed as follows:

(a) One-half to the decedent's niece, Florence Fermor-Hesketh;

(b) All of the remaining one-half not disposed of as set forth in subparagraph (c) below in trust for the children of Florence Fermor-Hesketh born before decedent's death, with remainders over, the terms of said trust being set forth in paragraph Seventh, subparagraph (b), of the will;

(c) Out of the one-half not disposed of to Florence Fermor-Hesketh, a named sum in trust for the decedent's brother, William S. Tevis, with remainders over to decedent's four nephews, the sons of his brother, William.

Subparagraph (b) of paragraph Seventh of the will reads as follows:

"(b) All that part of the remaining one-half thereof which is not disposed of by the provisions of subdivision (c) of this paragraph (Seventh) I give, devise and bequeath to Fred T. Elsey, as Trustee,² upon the uses and trusts, and for the purposes and with the powers hereinafter specified, namely:

To receive the rents, issues and profits and income of the trust estate, and to pay the net rents, issues, profits and income therefrom in equal shares to the children of my niece Florence Fermor-Hesketh born before my death, or to the survivor or survivors of them, during their lives, respectively.

² Fred T. Elsey served as trustee until February 28, 1938, when the American Trust Company qualified as successor trustee.

If any of the said children of my said niece, Florence Fermor-Hesketh shall have predeceased me leaving issue living at my death, my said trustee shall forthwith transfer, pay over and deliver to the said issue of each of said children who predeceases me (and there is hereby given, devised and bequeathed to the issue living at my death of each of said children of my said niece who shall predecease me) one of as many portions of the said corpus of the trust aforesaid as shall be ascertained by adding together the number of the children of my said niece living at my death and the number of her children who predecease me leaving issue living at my death.

If after my death any of the said children of my niece born before my death shall die leaving issue, then there shall be transferred, paid over and delivered to such issue (and in that event there is hereby given, devised and bequeathed to such issue) one of as many parts of the aforesaid trust fund as shall be ascertained by adding together the number of the children of my said niece living at my death and the number of her children who predecease me leaving issue living at my death.

If upon the death of the last of the children of my said niece born before my death and after the issue of each of them who left issue either living at my death, or born thereafter, shall have received the portion of the trust fund which it is hereinabove provided shall be delivered to them, there shall be any overplus in the hands of such trustee, said overplus shall be then transferred, paid over and delivered (and, in that event, there is hereby given, devised and bequeathed) to the then living issue of the said children of my said niece in equal shares per capita and not per stirpes."

Florence Fermor-Hesketh, the decedent's niece, has had five children who were born prior to decedent's death, namely, Thomas S. Fermor-Hesketh born October 7, 1910; Louise Fermor-Hesketh Stockdale born December 15, 1911, Flora Fermor-Hesketh Baring Lawson born February 23, 1913, Frederick Fermor-Hesketh born April 8, 1916, and

John Breckinridge Fermor-Hesketh born March 7, 1917. Florence Fermor-Hesketh had no child who predeceased the decedent and at the time of the decedent's death no child of Florence Fermor-Hesketh had predeceased the decedent leaving issue living at the decedent's death (R. 38-9).

The first child, Thomas S. Fermor-Hesketh, died on June 21, 1937, without issue. Thus in 1946 and at the institution of this suit there were living four life beneficiaries, each of whom was entitled to receive one-quarter of the trust income (R. 39).

During 1946 there were in being five grandchildren of Florence Fermor-Hesketh, namely, three children of Flora Fermor-Hesketh Baring Lawson, the first of whom, John Baring, was born on December 2, 1934, and the other two on August 16, 1938, and August 14, 1946, respectively, and the two children of Louise Fermor-Hesketh Stockdale, one born on May 30, 1938, and the other on January 7, 1940. All of these direct lineal descendants were and are unmarried (R. 39). Since 1946 five additional grandchildren have come into being, all of whom are minors and unmarried and are citizens and residents of the United Kingdom (R. 43-4).

Upon the death of each of the four children of Florence Fermor-Hesketh living in 1946, the trust in respect to one-fifth of the corpus will terminate and the remainder fall in.³ But since Thomas S. Fermor-Hesketh died without issue, one-fifth of the corpus is an "overplus" which the trustees will retain until the death of the last of the children to die, on which event such overplus will be divided equally between the then living issue of Florence Fermor-Hesketh's children in equal shares per capita (R. 38).

³ One of these four, Frederick Fermor-Hesketh, died on June 17, 1955.

The four children of Florence Fermor-Hesketh and her five grandchildren in existence in 1946 were in 1946 and are residents of the United Kingdom within the compass of the United Kingdom Income Tax Convention (R. 39-40). They were all born, domiciled in and subjects, citizens and residents of the United Kingdom; since the dates of their respective births they have continued to be domiciled in and subjects, citizens and residents of the United Kingdom; they have lived continuously in the United Kingdom; they have all been educated in the United Kingdom and, when married, they have married citizens and residents of the United Kingdom; and their friends, interests and affairs have all centered in the United Kingdom (R. 42-4). Such children and grandchildren were not in 1946 and never have been citizens of the United States; they were in 1946 and always have been resident of the United Kingdom for the purposes of the United Kingdom income tax, and were not in 1946 and never have been resident in the United States for purposes of the United States income tax; they were not and never have been engaged in trade or business in the United States; and did not have in 1946 and never have had a permanent establishment situated within the United States (R. 41-2).

During 1944 and 1945 and at all times since then, under the system of income taxation in the United Kingdom of Great Britain and Northern Ireland a charge or tax is imposed upon income but not upon realized accretions of capital; a resident or non-resident individual, a corporation or a trustee of an express trust who realizes gains or profits on the sale of securities or real and other property in the United Kingdom is not chargeable with income tax (including surtax), the excess profits tax or the national defense contribution (in 1946 renamed the profits tax) unless what is done is not merely a realization or change of investment but an act done in what is truly the carrying on or carrying

out of a business; subject to the foregoing, an accretion of capital is not taxable income merely because the original capital was invested in the hope and expectation that it would rise in value, and if it does rise in value the realization on a sale does not result in taxable income (R. 45-6).

In view of this state of the United Kingdom law, if the sales which the plaintiff as trustee made in 1946 of part of the property comprising the corpus of the Tevis trust had been made by a trustee of a trust created in the United Kingdom in terms of the Tevis trust here involved, they would have been in realization on and changes of investments within the foregoing rule of the United Kingdom law, and the gains or profits realized on such sales would not have been subject to the United Kingdom income tax (R. 46).

Under the terms of the Tevis trust and the laws of California, the gains and profits realized on the sales made by the plaintiff as trustee in 1946 were not distributable to the life beneficiaries of the trust, but the entire proceeds of the sales, including the profit thereon, were required to be and were retained by the trustee as part of the corpus of the trust, and the income taxes, if any, arising from such sales were chargeable against the corpus of the trust (R. 40).

On the sales of the securities in 1946, the plaintiff as trustee realized \$2,574,000 in cash (R. 41). Following the sales, the plaintiff reinvested the cash proceeds (after setting aside an amount sufficient to pay the expenses of and taxes on such sales) in securities which were held as part of the corpus of the trust fund. The average rate of return from the securities so purchased out of such proceeds for the succeeding seven-year period, 1947-1953, inclusive, was approximately 3.84% (R. 45). As a consequence of the capital gains tax imposed on account of such sales, the income of the four life beneficiaries of the

trust in the aggregate was reduced by about \$22,000 each year.

The major tax burden falls upon the remaindermen. The taxes here involved amount to \$590,957.86. This amount was charged to and reduced the corpus of the Tevis trust. Unless relief is accorded, the principal of the trust belonging to the British remaindermen is reduced by \$590,957.86.

Summary of Argument

1. The capital gains here involved are exempt from United States tax under Article XIV of the United Kingdom Income Tax Convention, which provides in broad and simple language: "A resident of the United Kingdom" shall be exempt "from United States tax on gains from the sale * * * of capital assets". Section 22(b)(7) of the Internal Revenue Code makes the exemption an integral part of our revenue statutes.

2. The exemption in Article XIV must be determined under the treaty, in view of Section 22(b)(7). Our domestic rules of taxing the income of trusts are irrelevant unless authorized by the treaty. Construing Article XIV within the four corners of the treaty, the capital gains here involved are made exempt from United States tax.

3. Throughout the treaty the primary objective was the accomplishment of full reciprocity and equality of tax treatment between the nationals of the contracting parties. In a reverse but like situation, the United Kingdom does not impose a tax on capital gains from the sale of property in trust. Article XIV was intended to put the nationals of both parties on the same footing. Unless Article XIV is given the broad interpretation for which we contend, it will be the one article which does not accomplish reciprocity.

4. The analogy of the Court below to a United Kingdom stockholder of a United States corporation which realizes a capital gain on the sale of the corporate property is without force. In Articles VI, XIII and XVI, the treaty specifies in detail the treatment to be accorded corporate stockholders in respect to corporate profits and the taxation of such profits, and in Article II (1) a corporation is defined as a distinct "entity" or "juridical person". Nowhere in the treaty is a trust accorded recognition as an "entity" or "juridical person". The relationship of a stockholder to the corporate assets is fundamentally unlike the relationship of a beneficiary to property held in trust.

5. The approach of the Court below in resolving the issue and its major conclusion of law were fundamentally fallacious. The Court erred in applying "the scheme of taxation" under United States law, *i.e.*, Sections 161 and 162 of our Revenue Code of 1939, thus making the exemption depend on the status of the trustee and not on the status of the remaindermen.

6. In applying the exemption accorded by Article XIV, a distinction between legal and beneficial ownership is unwarranted. The capital gains here involved were income in equitable ownership of the remaindermen, and accordingly qualified for exemption. Under our modern conceptions, there is no material distinction between legal and equitable ownership for tax purposes. *Helvering v. Hutchings*, 312 U. S. 393 (1941); *Commissioner v. Nevius*, 76 F. 2d 109 (2d Cir. 1935), *cert. denied*, 296 U. S. 591. Concededly, capital gains realized by individuals who are residents of the United Kingdom are exempt under the treaty. The intervention of a trust and a trustee holding only legal title should not affect the exemption, irrespective of the citizenship of the trustee. The beneficiaries of a trust are not *in pari passu* with the stockholders of a corporation.

In the case of gifts in trust, there are as many exemptions as there are life beneficiaries, *Helvering v. Hutchings*, *supra*, but in the case of a gift to a corporation there is only one exemption. See *Heringer v. Commissioner*, 235 F. 2d 149 (9th Cir. 1956).

7. It is irrational to make a distinction between distributable and undistributed capital gains in applying the treaty exemption. The language of Article XIV does not permit of such a distinction. Concededly, capital gains are exempt when distributable. It is irrational to deny the exemption when the gains are retained for future distribution. In both cases the gains arise out of a sale made by the trustee, who, holding only legal title, necessarily acts in a representative capacity, and in both cases the burden of the tax falls upon residents of the United Kingdom. Such a distinction would make the exemption depend on local state law declaring whether a capital gain is or is not distributable, when an international convention should have nationwide uniformity of application.

8. An exemption accorded in an international convention overrides our domestic rules of taxation in the absence of an express exception or saving clause in such Convention. In the Swedish Convention (before this Court in *Lewenhaupt v. Commissioner*, 20 T. C. 151 (1953), *aff'd per curiam*, 221 F. 2d 227) and in virtually all of our income tax conventions there is a saving clause which expressly recites: "Notwithstanding any other provision of this Convention" the United States may impose income taxes on its citizens, residents or corporations when such taxes are imposed under our domestic revenue laws "as though this Convention had not come into effect". But no such saving clause appears in the United Kingdom Convention, and the Convention as a whole negatives any intention to adopt the rule.

9. Under principles now firmly established, the Convention must be given a liberal construction in support of the rights claimed under it; if it admits of two constructions, the more liberal will be adopted, *Geofroy v. Riggs*, 133 U. S. 258 (1890), and cases cited *infra*.

10. Throughout the year of sale all the remaindermen of the trust were qualified citizens and residents of the United Kingdom so that the capital gains were within the exemption, despite the remote possibility of a change in exempt status or of a future shifting of interest within the closed class.

ARGUMENT

I

THE CAPITAL GAINS HERE INVOLVED ARE MADE EXEMPT UNDER THE UNITED KINGDOM INCOME TAX CONVENTION, AND, SINCE AN INTERNATIONAL TREATY, THE CONVENTION IS CONTROLLING.

An international treaty between two sovereign nations is a document which may not be lightly tossed aside. Yet this in effect is what the Court below has done.

The Constitution of the United States (Article VI, Clause 2) declares that all treaties made under the authority of the United States "shall be the supreme Law of the Land". In the case here involved, the Congress has expressly implemented any exemption accorded in our income tax conventions with other nations, for Section 22(b)(7) of our Revenue Code provides broadly that "Income of any kind" shall be exempt from taxation "to the extent required by any treaty".

Since 1936 when Section 22(b)(7) was first enacted, it has been the declared policy of Congress to give full

recognition to treaty provisions in case of any conflict between the treaty and our domestic revenue laws. Section 22(b)(7) was limited to exemptions in treaties, but in 1942 Congress broadened the policy so that it embraced any treaty obligation. Thus in the Revenue Act of 1942 making certain amendments to the 1939 Code, Section 109 entitled "Treaty Obligations" provided:

"No amendment made by this title shall apply in any case where its application would be contrary to any treaty obligation of the United States."

And again in enacting the Internal Revenue Code of 1954, Congress expressly provided in Section 7852(d):

"(d) Treaty Obligations.—No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title."

Section 22(b)(7) here controlling exempts from taxation *income of any kind* (clearly broad enough to include capital gains) "to the extent required by any treaty obligation". Article XIV of the United Kingdom Convention is an international obligation which the United States has undertaken and must fulfill. Thus Section 22(b)(7) is a solemn declaration by the Congress that the character and extent of an exemption accorded by a treaty shall be determined within the four corners of the treaty, irrespective of and without regard to the rules prescribed in our domestic revenue statutes, unless the treaty itself contemplates that such domestic rules are applicable.

Yet the Court below rested its decision in the main upon our domestic scheme of taxation as set forth in Sections 161 and 162 of our Revenue Code,⁴ declaring that under

⁴ The material parts of these sections of our Revenue Code as they appeared in 1946 are printed in our Appendix.

these sections the trustee of a trust is accountable for and must pay the tax on gains retained for future distribution and since here a United States citizen, the gains are not within the exemption. The Court concedes on the other hand that if such gains are currently distributable, the exemption in the treaty applies.

The United Kingdom treaty aside, under Sections 161 and 162 a trustee of a trust must report the income of the trust, whether in the form of current income or capital gain. The trustee is allowed a deduction on account of amounts currently distributed or distributable, and is required to pay any tax on the balance. In respect of distributable income, the tax is imposed upon the beneficiary-distributee. The Supreme Court of the United States analyzed these sections in *Helvering v. Butterworth*, 290 U. S. 365 (1933), and *Freuler v. Helvering*, 291 U. S. 35 (1934). Congress, it was said, did not intend that any income from a trust should escape taxation. But in the *Butterworth* case the Supreme Court added significantly "unless definitely exempted".

But the United Kingdom Convention cannot be put aside. It necessarily carries compelling weight. If the Convention, in and of itself, exempts the capital gains here involved, the rules of our domestic revenue statutes cannot be invoked to limit the exemption, unless there is something in the Convention itself which contemplates the adoption of such rules *as part of the Convention*.

We submit that under Section 22(b)(7) of the Internal Revenue Code, the Court must look to the treaty, and the treaty only, in deciding whether the gains here involved are exempt from taxation.

(1)

The exemption accorded by Article XIV embraces capital gains on property held in trust, whether such gains are currently distributable or are retained for future distribution.

We turn now to a consideration of the treaty and the meaning of the word "exempt" as it appears in Article XIV.

Article XIV provides in broad and simple language: "A resident of the United Kingdom" shall be exempt "from United States tax on gains from the sale * * * of capital assets."

It is not disputed that the life beneficiaries and the remaindermen of the Tevis trust fully qualify as residents of the United Kingdom (R. 39-42) and in all other respects meet the requirements of the treaty. Nor is it disputed that the exemption in Article XIV applies to capital gains on the sale of property held by a trustee in trust. The defendants concede, and, indeed, the Treasury Regulations (see p. 4, *supra*) expressly provide, that such gains are exempt when currently distributable, but the defendants contend that the exemption is inapplicable when the gains are held for future distribution.

In either case, whether distributable or undistributable, the gain arises out of the sale of property held in trust. In the case of a distributable gain, the trustee, not the life beneficiary, decides whether a sale shall be made and if so at what price, and the trustee, not the beneficiary, takes the necessary steps to effect a sale and does the act which transfers the legal title to the purchaser. Thus it is evident that the exemption accorded by Article XIV applies to the gains of the sale of property held in trust, a limited exemption, say the defendants, but they necessarily concede that Article XIV applies in respect of the sale of property in trust.

Thus the issue narrows down to whether Article XIV also applies to gains on the sale of trust property when the

gains are retained for future distribution. It is not the applicability of Article XIV to gains on property in trust, but, rather, the *extent* of the applicability which is the major issue here in dispute.

The Court below attributed to the word "exempt" a technical and quite out of the ordinary meaning of the term in common use. The word, it is said, applies narrowly to "the taxpayer", *i.e.*, the particular individual who, under our domestic scheme of taxation, is primarily liable for the tax, although not the ultimate bearer of the tax.

Unless the capital gains here involved are exempt, the United Kingdom remaindermen unquestionably sustain the amount of the tax, even though not technically "the taxpayer". The word "exempt" as used in Article XIV is, we submit, broad enough to embrace the capital gains here involved.

The word "exempt" is nowhere defined in the treaty. The generally accepted meaning of the word, as defined in our standard dictionaries of the English language, is "to free, except, or excuse from some burdensome condition or obligation, or the operation of some law to which others are subject". Funk & Wagnalls New Standard Dictionary of the English Language, 1947 Edition, p. 872. The 1950 edition of the same publication, p. 348, carries a secondary meaning, "free or excused from some burden or obligation: as *exempt* from taxation".

Our courts have not infrequently adopted and applied this meaning. *Maine Water Co. v. City of Waterville*, 93 Me. 586, 45 Atl. 830, 833 (1900); *In re the Matter of Sowers*, 60 N. C. 459, 461 (1864); *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373, 380 (1874); *Florer v. Sheridan*, 137 Ind. 28, 36 N. E. 365, 369 (1894). Thus in *Maine Water Co. v. City of Waterville*, *supra*, the Supreme Court of Maine said:

"The term 'exemption' implies a release from some burden, duty, or obligation. It is a grace, a favor, an immunity; taken out from under the general rule, not to be like others who are not exempt:"

The nearest approach to what might be considered a definition in the treaty is in Article II, subparagraph (3), which is couched in very general language. This subparagraph provides that "any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention", namely, income taxes, surtaxes and excess profits taxes (Article I). But in our own revenue laws, the word "exempt" is not limited in meaning to an exemption of "the taxpayer"; it frequently denotes an "exclusion" and not relief from a personal or individual "liability". In certain instances it is coupled with and used interchangeably with the word "credits", as, for example, in Section 25 authorizing "the following credits against net income", including "An exemption of \$600 for the taxpayer" and additional "exemptions" of \$600 for his spouse and for each dependent. Frequently the word is used interchangeably with the phrase "there shall be excluded from gross income", as in Section 22(b) and Section 116. Indeed, Section 22(b) reads "The following items shall not be included in gross income and shall be exempt", which necessarily embraces capital gains "to the extent required" by the United Kingdom Convention. Sometimes the word "exempt" attaches to a described individual, sometimes it attaches to the item itself, regardless of the recipient of the item, as in the case of so-called tax exempt income in the form of interest from government, state and municipal bonds under Section 22(b)(4).

Thus there is no precise measure for the meaning of the word "exempt" as it appears in Article XIV. The commonly accepted meaning of the word in current use, namely, to "free or excuse" from "some burdensome condition" or "release" from "some burden affecting other persons", fully justifies the meaning for which we contend. There is nothing in the context requiring a more limited and technical import. On the contrary, the context supports our view. There is no requirement (such as appears in some

of our income tax conventions) that the gain is exempt "when realized by" a resident of the United Kingdom, with the possible implication that the United Kingdom resident must have made the sale to qualify for exemption. The language used was quite different—far broader and more inclusive: "A resident of the United Kingdom * * * shall be exempt from United States tax on gains from the sale or exchange of capital assets".

Indeed, the treaty itself indicates that "exempt" is used in a broad, non-technical meaning. In Article III, relieving from tax under certain circumstances the industrial and commercial profits of an enterprise of either of the two contracting parties, the phrase "shall not be subject to" is used interchangeably with "exempt". Thus the implication in the treaty itself is that any resident of the United Kingdom shall not be subject to the tax, that is to say, shall be relieved from the tax, irrespective of the person who in the first instance may pay the tax.

The words of Mr. Justice Oliver Wendell Holmes in *Towne v. Eisner*, 245 U. S. 418, 425 (1918) are not without significance here: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

(2)

Throughout the treaty the main objective was the accomplishment of full reciprocity between the nationals of the contracting parties; unless Article XIV is given the broad interpretation for which we contend, it will be the one article which does not accomplish reciprocity.

In interpreting Article XIV, the several articles of the treaty and the treaty as a whole may be considered, in an effort to determine the intent of the negotiators. *In re Ross*, 140 U. S. 453, 457 (1891). If, from a consideration of the

several articles, it appears that in each full reciprocity and equality of tax treatment was accomplished so far as practicable, it is reasonable to conclude that Article XIV was no exception, and that complete, not partial, exemption from United States tax was intended. The exemption here claimed is entirely practicable.

The Court below rejected our argument predicated upon reciprocity, saying (R. 28) that in a like but reverse situation the United States beneficiaries are not taxed because there is no capital gains tax in the United Kingdom, thus implying that reciprocity in a treaty exists only in the case of express reciprocal provisions. The Court added (R. 29) it was not convinced that perfect equality of tax treatment was intended, saying, quite gratuitously, that the negotiations "usually consist of a series of tax concessions", and therefore "complete reciprocity is seldom possible".

Surely Article XIV, or indeed any article of the treaty, does not need mutually reciprocal *language* if the language employed actually secures reciprocity. Inasmuch as the United Kingdom does not tax capital gains, it was only necessary to exempt residents of the United Kingdom from the United States tax in order to accomplish reciprocity. While Article XIV on its face is a one-way street, the article secures full equality of treatment on account of the state of the law of the United Kingdom.

The Court below recognizes that Article XIV secures a limited reciprocity, namely, where a United Kingdom resident makes the sale or where, in the case of the sale by a trustee, the gain is currently distributable to a United Kingdom resident. But this limited reciprocity sharply discriminates against a United Kingdom remainderman, for in the reverse situation a United States remainderman is not subject to tax.

Thus the question is whether inequality of tax treatment nevertheless was intended and persists under the treaty, in spite of the broad language of Article XIV.

On an analysis of each of the several articles of the Convention, we maintain, without fear of contradiction, that full and complete reciprocity was accomplished throughout the treaty in the situations covered by the treaty, so far as reciprocity could be accomplished.

The treaty contains twenty-four articles. The full text is printed in our Appendix. Of these, seventeen undeniably secure thoroughgoing reciprocity, with mutually reciprocal provisions cast in virtually identical language, namely, Articles I-V, VII, VIII, X, XI, XII and XVIII-XXIV. The remaining articles, namely Articles VI, IX, XIII, XIV, XV, XVI and XVII are not reciprocal on their face, but a close examination of such articles shows that in every instance the contracting parties intended to secure and did secure actual reciprocity, and, in doing so, went far beyond the elimination of double taxation.

Articles VI, IX and XIII illustrate the extent to which the negotiators went in assuring reciprocity, notwithstanding differences in the theories of taxation in the two countries.

Under Article VI, the United States withholding tax on dividends received from a United States corporation by a United Kingdom resident (normally 30%) is reduced to 15%, while on the other hand dividends received by a resident of the United States from a United Kingdom corporation are made exempt from the British surtax. While apparently representing different tax treatment, Article VI in fact achieved exact equality of treatment in the taxation of corporate earnings. When the Convention was adopted, under British law, the corporate profits of a United Kingdom corporation were subject to income tax at a standard rate of 50% paid by the corporation directly to the British Treasury and a national defense contribution of 5%, or 55% in all (R. 46-7). The stockholder obtained a credit for the purpose of the standard or normal tax equivalent to the tax paid by the corporation, but he was required to pay surtax on the entire dividend (R. 46-7).

On the adoption of the Convention, the United States rate on corporate earnings was 40%. Thus by fixing the withholding rate on dividends received from an American corporation by a resident of the United Kingdom at 15% and at the same time exempting our residents from any surtax on dividends from a United Kingdom corporation, the residents of each of the contracting parties bore the same burden of tax on the pool of corporate earnings, at the rate of 55%. The treaty viewed the economic burden of taxation on the pool of corporate earnings as a whole, and, disregarding the identity of the technical "taxpayer" under domestic law, secured full reciprocity with exactitude.

Bearing in mind that a change in tax rates by either country might upset the reciprocal balance achieved by Article VI, the parties added a clause, subparagraph (3) of Article VI, providing that either of the contracting parties might terminate Article VI by written notice on or before June 30th of any year after 1945.

By Article IX the current United States withholding rate of tax on royalties from mines and other natural resources and on rentals from real property derived from sources within the United States by a United Kingdom resident was reduced from 30% to 15%, a rate which applied on the *gross* amount received. On the other hand, similar royalties and rentals from real property from sources within the United Kingdom derived by a United States resident were made exempt from the United Kingdom surtax, but under United Kingdom law were subject to the standard or normal tax at the prevailing 50% rate, a rate which applied on the *net* amount received, *i.e.*, after credits and deductions (R. 47). A 15% tax on the *gross* receipts was approximately equivalent to a 50% tax on the net receipts, and so equality of tax treatment was accomplished between the residents of the two contracting parties.

Thus in the formal Hearings before a subcommittee of the Committee on Foreign Relations when the United Kingdom Income Tax Convention was before the Senate for ratification, printed by the United States Government Printing Office in Washington, a public document (hereafter referred to as the "Senate Report"), it was stated with respect to Article IX:⁵

"The United States rate of 30 percent is imposed upon the gross amount of such items [natural resource royalties and rentals] without any allowance for deductions. The reduction in the United States rate from 30 percent to 15 percent upon the gross amount of the rentals is intended to constitute a tax burden corresponding as nearly as may be to the British rate of 50 percent upon the net rentals."

In the same hearings, Eldon P. King, a Deputy Commissioner of Internal Revenue, who negotiated the treaty on behalf of the United States, testified:⁶

"The solution reached in Article IX respecting rentals from real estate and natural resources reflects the reduction in the United States rate of tax on the gross to approximate the British tax on the net income * * *."

Article XIII deals with reciprocal tax credits. It is significant in two important respects. First, in order to achieve reciprocity of tax treatment, the United Kingdom

⁵ Senate Report, p. 23. This statement is in a printed document entitled "Memorandum Prepared for the Committee on Foreign Relations, United States Senate, Relating to the Convention with Great Britain and Northern Ireland with respect to taxes on Income" which was filed at the Hearings. It was prepared under the supervision of Mr. Colin F. Stam, Chief of Staff of the Joint Committee on Internal Revenue Taxation, and hereinafter will be referred to as the "Stam Memorandum".

⁶ Senate Report, p. 61.

made a major legal and policy adjustment by agreeing to adopt a provision for foreign tax credits; prior to the Convention, credits against the United Kingdom tax on account of foreign taxes paid were unknown under British law (R. 47). Thus it was stated in the Senate Report with respect to Article XIII:⁷

“In arriving at the major reciprocal provisions in the British convention, it is important to observe that it was necessary for Britain to modify its existing law through the adoption of credit principles substantially similar to those employed by the United States, * * *. These represented major legal and policy adjustments on the part of Britain * * *.”

Second, in providing a credit for foreign taxes, the United States made an important concession, again for purposes of achieving reciprocity. By Article XIII the foreign tax credit allowed United States residents on dividends from a United Kingdom corporation expressly authorizes the inclusion of the United Kingdom standard tax paid by the British corporation to the British Treasury and deducted from the dividend. Thus it is provided that, for purposes of the credit, the United States recipient of a dividend from a United Kingdom corporation “shall be deemed to have paid” the United Kingdom income tax withheld by the paying corporation in respect of such dividend, if the recipient includes in gross income for our purposes the United Kingdom income tax so withheld by the paying corporation.

This represents a major departure from the United States tax law, for prior to the treaty the Commissioner of Internal Revenue maintained and the United States Supreme Court had held in *Biddle v. Commissioner*, 302 U. S. 573 (1938) that an American recipient of a dividend

⁷ Stam Memorandum, Senate Report, p. 29.

from a British corporation is not "the taxpayer" in respect of the United Kingdom standard tax paid by the corporation, and accordingly was denied any credit on account of such tax.⁸

Conversely, Article XIII provides that the credit for United States tax, allowed by the treaty for a British recipient of a dividend from a United States corporation, shall include the United States corporate income tax imposed on such corporation in respect of its profits.

Article XIII, consistent with the treaty as a whole, expressly disregards our technical conception of "the taxpayer" and places the nationals of the two countries upon a reciprocal basis.⁹

Articles XIV, XV, XVI and XVII each involved a concession upon the part of the United States only. By each Article, the United States agreed to a tax exemption not otherwise accorded by our tax laws so as to equalize and

⁸ In the course of his testimony, Mr. Colin F. Stam said (Senate Report, p. 71) :

"Now the question came up as to whether or not under the American law this British tax should be regarded as a tax on the corporation. The Supreme Court said in effect, in the Biddle case, that under the concept in this country this is a tax of the corporation, and the law does not permit the shareholder to get credit for the tax. The convention adopts the British concept and allows the shareholder to get the credit. The treatment is reciprocal."

⁹ In the course of his testimony, Mr. Eldon P. King said (Senate Report, p. 60) :

"As a part of the solution Britain agreed to treat the United States corporate normal tax and surtax as being borne by the British shareholder, and the United States agreed to treat the British standard tax as being borne by the United States shareholder."

match the United Kingdom rule, which did and does not impose any tax in corresponding situations. The exemptions, altogether unnecessary for eliminating double taxation, were essential only in order to achieve complete mutuality and reciprocity in treatment as between residents of the United Kingdom and residents of the United States.

Article XIV, with which we are here involved, secures mutuality and equality of treatment by eliminating a United States tax in a situation where, in the same but reverse state of affairs, the United Kingdom imposes no tax. In the very nature of the case, it is directed at reciprocity and not at the elimination of double taxation. We shall pass it for the moment and consider Articles XV, XVI and XVII.

Article XV again illustrates the achievement of equality of tax treatment through an exemption of United States tax when, in view of the United Kingdom statutes, no comparable tax was imposed. Again it has nothing to do with the elimination of double taxation. Prior to the treaty, the United States taxed dividends and interest paid to British residents (and other non-resident aliens) by a United Kingdom corporation which was engaged in business in and derived a certain percentage of its gross income from United States sources (20% in the case of interest and 50% in the case of dividends). On the other hand, in the reverse situation the United Kingdom never imposed any tax on dividends and interest from a United States corporation when received by a United States resident even though the United States corporation was engaged in business in and derived a substantial amount of gross income from United Kingdom sources (R. 48). Complete equality of tax treatment was achieved in such situations by Article XV, which exempted from United States tax dividends and interest paid by a United Kingdom corporation except

where the recipient is a United States citizen or resident.¹⁰ This had the desired effect of exempting citizens and residents of the United Kingdom from any United States tax, and so putting the nationals of the two contracting parties upon an exact equality of tax treatment. Thus, in this narrow area where there formerly existed inequality of tax treatment between the two countries, Article XV, representing an important concession by the United States, accomplished complete equality in tax treatment. In purpose and effect, Article XV is quite parallel to the exemption of Article XIV.

As in the case of Articles XIV and XV, Article XVI was adopted to provide an exemption from United States taxes where, in the reverse situation, there was no comparable United Kingdom tax. Again, it has nothing to do with the elimination of double taxation. Unlike our tax acts, the United Kingdom has never undertaken to impose taxes upon corporate accumulated or undistributed earnings (R. 48). Accordingly, in order to insure equality, by Article XVI a United Kingdom corporation engaged in

¹⁰ The Stam Memorandum states (Senate Report, p. 25):

"This article owes its existence to the fact that the United States, unlike the United Kingdom, holds that dividends paid by a foreign (as to the United States) corporation may constitute income from sources within the United States if 50 percent or more of the gross income of such corporation is derived from sources within the United States (sec. 119(a)(2)(B), Internal Revenue Code). Thus, if a United Kingdom corporation derives business or investment income from sources within the United States to the extent of such percentage, the dividends paid by such corporation to its shareholders living in the United Kingdom are, to that extent, income from sources within the United States and hence would be theoretically taxable in the hands of such resident of the United Kingdom. The United Kingdom does not undertake to assert its tax against the dividends paid by a United States corporation deriving income from sources within the United Kingdom. * * * The purpose of the article is, therefore, to reciprocate with the United Kingdom as to taxation of dividends paid by a foreign corporation."

business in the United States is made exempt from the United States tax on its accumulated and undistributed earnings, subject to the limitation that residents of the United Kingdom throughout the last half of the taxable year control more than 50% of the voting power.¹¹

Article XVII covers the settlement of delinquent United States taxes due by residents of the United Kingdom under circumstances now covered by Articles XV and XVI. In result, Article XVII makes Articles XV and XVI effective in respect of prior unpaid taxes due by residents and corporations of the United Kingdom. As indicated above, Articles XV and XVI granted exemption from United States taxes which the United Kingdom never imposed, so there was no occasion to make provision for like delinquent taxes of residents of the United States, since none existed.

Certainly, these four articles, all exemptions, bear conclusive testimony of a purpose wholly foreign to the elimination of double taxation. They indicate a dogged intention to create equality of tax treatment in so far as practically possible under the respective tax laws of the two nations.

The presence throughout the treaty of this complete mutuality or reciprocity in treatment as between residents of the United Kingdom and residents of the United States is not surprising. As in the case of all treaties, each of the two contracting parties naturally was motivated by a desire to see that its nationals were placed at no disadvantage when compared with the treatment accorded the nationals of the other contracting party. Besides, in any tax convention between two sovereign nations it is only

¹¹ In the Stam Memorandum discussing Article XVI it is said (Senate Report, p. 25) :

"Here again the United Kingdom does not impose tax upon the undistributed profits or surplus of a United States corporation. Hence the article is intended to establish a reciprocity in this regard as between the two countries."

right and proper that the nationals of each of the two countries should not be given any preference but should receive equal treatment in all of the situations covered by the treaty. As our Supreme Court has repeatedly recognized, in international treaties it is invariably the intention of the contracting parties "to secure equality and reciprocity between them". See pages 52-4, *infra*.

The Court below (R. 29) doubted that perfect equality of tax treatment was intended to be accomplished by the Convention, observing that tax conventions usually consist of a series of tax concessions made by each party, and therefore complete reciprocity "is seldom possible". In the Convention under consideration, reciprocity was not accomplished or intended to be accomplished in every conceivable situation, but from what we have said above it is evident that reciprocity *was* intended *in the situations covered by the treaty*, certainly to the extent that reciprocity was possible. Towards this end, both parties to the Convention had to make important concessions, as did the British in the case of tax credits and the United States in the case of certain exemptions, including the exemption accorded in Article XIV.

There are only two possible functions of each Article of the United Kingdom Convention: the elimination of double taxation and reciprocity. In the case of Article XIV double taxation could not possibly be involved. The single purpose behind the adoption of Article XIV was reciprocity. Accordingly, in the absence of an intent to the contrary indicated either by the language of the article itself or by some other article dealing more particularly with the same subject matter, Article XIV should be construed in a manner consistent with such underlying purpose. On the face of the treaty there is no room for an arbitrary half measure of reciprocity.

(3)

The analogy suggested by the Court below to a United Kingdom stockholder of a United States corporation realizing a capital gain on the sale of corporate property is without force.

Nevertheless, the Court below repudiated the reciprocity argument. It said (R. 28) that the reason a United States beneficiary of a United Kingdom trust in a reverse situation would be free from any capital gains tax is because there is no capital gains tax in the United Kingdom, saying that "One could just as well argue that a resident of the United Kingdom who held stock in an American corporation should be free from the burden of United States capital gains taxes on the sale of corporate property".

The analogy to a United Kingdom stockholder in an American corporation is, we submit, quite beside the point. Under the Convention as drafted and under the substantive laws of the contracting parties, there is no place for such an argument, and the analogy is quite unsound. The Convention in Articles VI, XIII and XVI spells out in detail the treatment to be accorded corporate stockholders in respect to corporate profits and the taxation of corporate profits; and the Convention in Article II(1) expressly defines a corporation as a distinct "entity" or "juridical person". Thus it is provided (Article II(1)):

"(d) The term 'United States corporation' means a corporation, association or other like entity created or organized in or under the laws of the United States.

(e) The term 'United Kingdom corporation' means any kind of juridical person created under the laws of the United Kingdom."

But nowhere in the Convention is a trust accorded recognition as an "entity" or "juridical person". Accordingly, it appears that the Convention itself recognizes the funda-

mental difference in substantive law between the relationship of a stockholder to the corporate assets and the relationship of a beneficiary to property held in trust.

The relationship of a stockholder to the corporate assets is fundamentally different from the relationship of a beneficiary to property held in trust. As stated by the Supreme Court in *Klein v. Board of Tax Supervisors*, 282 U. S. 19, 24 (1930), a corporation's "ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members". The corporate assets belong to the corporation; the shares belong to the shareholders and are distinct and independent property. Thus there is only one gift tax exemption in case of a gift to a corporation, notwithstanding the indirect proportionate benefits derived from such gift by the stockholders. See *Heringer v. Commissioner*, 235 F. 2d 149 (9th Cir. 1956). However, in the case of gifts in trust, the Supreme Court has held that there are as many gift tax exemptions as there are life beneficiaries of the trust. *Helvering v. Hutchings*, 312 U. S. 393 (1941).

Again, under our estate tax law, where a British stockholder of a British corporation dies, and the corporation has assets in the United States, the stockholder is not subject to our estate tax in respect of such assets, since he does not own or have a taxable interest in such assets. On the other hand, if a British beneficiary of a British trust dies, and such trust has assets in the United States, the beneficiary is subject to our estate tax in respect of such assets; he is considered either "the owner" of such assets or as having a taxable interest therein. This was the holding in *Commissioner v. Nevius*, 76 F. 2d 109 (2d Cir. 1935), *cert. denied*, 296 U. S. 591, in which Judge Swan observed (p. 110):

"Equitable interests are so common and so valuable that it is incredible that they should be excluded from taxation. The naked legal title of a trustee during continuance of the trust has no pecuniary value."

(4)

The approach of the Court below was fundamentally fallacious; it erred in making the exemption depend on the status of the trustee and not on the status of the remaindermen.

In view of the foregoing discussion, let us now consider in more detail the approach of the Court below in deciding the issue here presented.

Adopting the contention of the defendants that the capital gain was not the income of the remaindermen but the income of the trustee, which does not qualify for exemption, the Court below said (R. 25) that such contention "is based on a distinction that has long been made in the scheme of taxation of trusts in the United States". And again (R. 30), "The basic issue here is, who is the taxpayer? It is perfectly reasonable for the defendant to follow United States law in making that initial determination", adding that there is nothing in the tax convention to warrant a different conclusion.

On the basis of this approach the Court framed its major conclusion of law as follows (R. 48):

"The capital gains involved in this case represent taxable income to the plaintiff herein and the plaintiff-trustee does not qualify for any exemption from taxation on that income."

We respectfully dissent from these views. In the absence in the treaty of any express or implied reservation of the right to apply United States law, the exemption in Article XIV should be interpreted and applied without regard to our domestic rules of taxation. This principle would seem to be a self-evident truth.

The exemption in Article XIV is not, we submit, a personal exemption limited only to a United Kingdom resident who reports and pays the tax. The exemption

has a broad, equitable purpose, namely, to exempt capital gains from taxation when a United Kingdom resident *in fact* would otherwise sustain the burden of the tax, that is to say, would "stand the tax", directly or indirectly.

By the very nature of an international treaty which applies equally to the nationals of both of the contracting parties, equality of treatment necessarily is of first importance. A nation would be remiss in its duty to its own citizens if it permitted such citizens to be placed at a disadvantage. In an international treaty which, as here, expressly deals with and, in the case of United Kingdom residents expressly exempts, capital gains from United States tax, the presumption is that the exemption accorded was intended to be broad enough to place the nationals of each of the contracting parties upon equal footing. The issue here, we submit, must be resolved upon a consideration of the treaty in and of itself, uninfluenced by any technical liability imposed upon a trustee under our domestic law, or by the taxable status of the trustee for the purpose of determining liability under our domestic law.

Nevertheless, the Court below persistently gave controlling weight to "the scheme of taxation of trusts in the United States", citing and quoting from *Freuler v. Helvering*, 291 U. S. 35 (1934), "as one of the leading cases".

The "scheme of taxation of trusts in the United States" is as the Court below indicates. But the scheme of taxation under United States law is not necessarily the scheme of taxation under the treaty. Indeed, the scheme of taxation under the treaty necessarily departs from our scheme of taxation for otherwise there would be no need for the treaty. This is particularly true in the case of a broad exemption such as is accorded in Article XIV. A treaty exemption would not be worth much if our domestic law nevertheless continued to apply. From the very nature of the question, our scheme of taxation must give way to a

treaty exemption. The question, therefore, depends on the extent of the exemption *under the treaty*.

In the excerpt quoted by the Court below from the *Freuler* case, the quotation is incomplete. The Supreme Court stated at the outset of the paragraph "Plainly the section contemplates the taxation of the entire net income of the trust". It then pointed out that the fiduciary may be required to accumulate or he may be given a duty currently to distribute it. "If the latter, then the scheme of the act is to treat the amount so distributable, not as the trust's income, but as the beneficiary's", adding, "The test of taxability to the beneficiary is not receipt of income, but the present right to receive it".

But the Court below did not quote a material statement, namely, "This treatment of the beneficiary's income is necessary to prevent the possibility of postponement of the tax to a year subsequent to that in which the income was received by the trustee", and it also did not quote the explanatory statement "If it were not for this provision, the trustee might pay on part of the income in one year and the beneficiaries on the remainder in a later year", thus lessening the tax burden.

Clearly the comments of the Supreme Court in the *Freuler* case quoted by the Court below were directed at the need of insuring the taxation of all the *taxable* income of a trust. It was thus directed at a relatively narrow issue. There was not involved and the Supreme Court did not consider the effect of an exemption upon the taxation of trust income. But in *Helvering v. Butterworth*, *supra*, where the Supreme Court adopted the same interpretation of Sections 161 and 162, the Supreme Court did consider the effect of an exemption, for it said (p. 369):

"Certainly, Congress did not intend any income from a trust should escape taxation unless definitely exempted."

Under our domestic statute law, in the case of a trust under which the remainderman is a charitable organization, the trustee is allowed a deduction on account of capital gains retained and permanently set aside for the remainderman and credited to corpus, and so such gains are not subject to tax. See Section 162(a) of the 1939 Code, our Appendix pp. 24a-25a; *United States v. Benedict*, 338 U. S. 692 (1950); *Commissioner v. Central Hanover Bank*, 163 F. 2d 208 (2d Cir. 1947); *Commissioner v. Bonfils Trust*, 115 F. 2d 788 (10th Cir. 1940). The fact that the trustee (who is not exempt) is "the taxpayer" does not affect the exemption.

Again, under our statutory withholding provisions, the payor in the first instance pays the tax and shifts the burden to the payee by deducting the amount of the tax from any distribution. If the payee is exempt, he may come forward and claim refund of the entire amount of tax reported and paid by the payor. The exemption does not depend upon the status of the payor, but it depends upon the status of the distributee, even though he is not technically "the taxpayer".

In *Estate of Emily Tait v. Commissioner*, 11 T. C. 731 (1948), a United States fiduciary claimed a deduction with respect to income distributable to a Canadian citizen when, under the Income Tax Convention with Canada (56 Stat. 1399), such income was exempt in the hands of the Canadian beneficiary. The Tax Court disallowed the deduction. The United States fiduciary, it said, was the taxpayer and, not being a resident of Canada, did not qualify for the exemption. Following an appeal taken by the taxpayer to the United States Court of Appeals, the case was remanded to the Tax Court on stipulation by counsel for both parties. Whereupon the Commissioner concurred in the taxpayer's contentions and the Tax Court entered a final decision of no deficiency. The Treasury issued a ruling repudiating the original *Tait* decision, I. T. 4019, 1950 Cum. Bull. 58, stating:

“To disallow the deductions in such cases would have the effect of taxing income which is specifically exempted by treaty.”

and, after citing *Helvering v. Butterworth*, *supra*, the ruling concluded:

“ * * * if the income is ‘definitely exempted’ by treaty provisions, effect must be given to such provisions.”

In its decision the Court below failed to give any weight to the fact that the capital gains here involved were equitably owned by United Kingdom remaindermen; it made an irrational distinction between distributable and undistributable gains; and it failed to take into account that the United Kingdom treaty did not contain the so-called standard saving clause appearing in all our prior income tax conventions.

(a) In applying the exemption accorded by Article XIV, a distinction between legal and beneficial ownership is unwarranted; the capital gains here involved were income in equitable ownership of the remaindermen and accordingly were exempt.

The Court below failed to recognize that for tax purposes equitable ownership under a trust is of equal dignity with legal ownership. The Court said (R. 30) that a basic condition of recovery is a showing that the capital gains here taxed were income of the beneficiaries of the trust, who alone qualify for the exemption, and that there is nothing in the Convention to indicate an intention to treat the capital gains as income of the beneficiaries.

We submit that the Court below erred in so holding. Article XIV is in general terms. It concededly applies to capital gains on the sale of property individually owned by a resident of the United Kingdom, and, in the case of the sale of property held in trust, it concededly applies to gains which are currently distributable to a United Kingdom life beneficiary. There is nothing in the language of

Article XIV which denies the exemption in the case of trust capital gains retained for future distribution, which occurs on the death of the life beneficiary and may happen in the year following the sale. Until a distribution occurs, the United Kingdom remaindermen are the equitable owners of the capital gains. There is no indication that a resident of the United Kingdom must hold the legal title to the property sold, in order to enjoy the exemption.

On the date of sale in 1946 all the beneficiaries of the trust qualified as residents of the United Kingdom. They were the equitable owners of the property sold, of the proceeds of the sale, and of the resulting capital gains. The Court below said that the capital gains were not "income" of the remaindermen. On the contrary, in equitable ownership these gains constituted profits belonging to the remaindermen in the year when realized, and will be distributed to such remaindermen on the death of the life tenants. For trust accounting purposes, such gains were credited to capital, but they represented very real earnings derived from the trust corpus and in truth and substance were income of the United Kingdom remaindermen in equitable ownership.

The fact that the trustee, an American corporation, held the legal title and as trustee effected the sale on behalf of the beneficiaries should not, we submit, render the capital gains taxable, in the face of the treaty exemption. So to hold is to exalt form over substance, in applying an international tax convention. We believe that the intervention of a trust and a trustee having legal title should not bar the exemption, when in the year of sale the beneficiaries were the equitable owners of the capital gains and qualified for the exemption. Such a rule is sound in principle and is supported by the adjudicated cases.

In *Commissioner v. Nevius, supra*, the intervention of a British trust and a British trustee holding legal title did not bar the imposition of estate taxes on a British bene-

fiary in respect of that portion of the trust *res* which had a situs in the United States. In the majority opinion, Judge Swan suggested that if a distinction between legal and equitable ownership exists, equitable ownership is of greater significance than legal ownership, observing (p. 110):

“Equitable interests are so common and so valuable that it is incredible that they should be excluded from taxation. The naked legal title of a trustee during the continuance of the trust has no pecuniary value.”

In his concurring opinion, Judge Learned Hand held that the British beneficiary “owned and held” the trust *res*, stating (p. 111):

“* * * it would, I think, quite contradict the whole scheme of the title to import a distinction between legal and equitable interests, whatever view one takes of equitable interests * * *. Only lawyers make that distinction today and not many even of them; it would be pedantic to impute it to Congress, even in a tax statute.”

In *Helvering v. Hutchings, supra*, the intervention of a trust and a trustee holding legal title did not bar separate gift tax exemptions in respect of each of the several beneficiaries of the trust. The Supreme Court held that in the case of gifts in trust there are as many gift tax exemptions as there are life beneficiaries of the trust, notwithstanding the fact that the gift was made to one trustee. The Supreme Court reasoned (p. 397):

“In the face of an exemption thus made broadly applicable to all gifts to all donees and in the absence of some indication of an intention to discriminate between gifts made directly to the donees and those made indirectly to the beneficiaries of a trust, we can hardly assume a purpose to favor one class of donees over the other * * *.”

Compare *Heringer v. Commissioner, supra*, involving a gift to a corporation with a limited number of stockholders, which cited and distinguished the *Hutchings* case. As we have already seen (p. 32, *supra*), the relationship of stockholders to the corporate assets and of the beneficiaries of a trust to the trust property is fundamentally dissimilar.

Our courts have been realistic in disregarding the formal technicality of legal title, not only for estate tax purposes as in *Commissioner v. Nevius, supra*, and gift tax purposes as in *Helvering v. Hutchings, supra*, but also for income tax purposes. *Lederer v. Stockton*, 260 U. S. 3 (1922). In *Lederer v. Stockton* the Supreme Court held that the income of a non-exempt trust was exempt when an exempt beneficiary was in practical but not legal possession of the income. At the time the *Lederer* case was decided, there was no specific statutory provision for the Supreme Court's disposition of the case; the case arose prior to the adoption in our statutes of an exemption for a trust or estate in respect of income permanently set aside for a charity.

The *Lederer* case dealt with a trust which was an "active trust" under the appropriate local rules, with a gift over to a charity. The Supreme Court of Pennsylvania had held that the income on the bequest in trust could not be paid to the charity until the death of a life annuitant, and that until such event occurred the income must remain in the control of the trustee under the will. Faced with this situation, the trustee transferred the entire bequest as a loan to the hospital secured by a mortgage on the hospital property, under the terms of which the hospital would pay only interest enough to satisfy the administrative charges and the remaining annuity, using the remainder of the income for its own purposes. The Government contended that the trust as interpreted by the Supreme Court of Pennsylvania was an active trust and one which

could not be terminated, and accordingly the income in question was not "income received" by a charity and so not within the exemption. Nevertheless, the Supreme Court held that the income was exempt. Mr. Chief Justice Taft said (p. 8):

"As the Hospital is admitted to be a corporation, whose income when received is exempted from taxation under § 11(a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

The *Lederer* case was cited with approval by the United States Court of Appeals for the Seventh Circuit as recently as March 4, 1954. See *Arthur Jordan Foundation v. Commissioner*, 210 F. 2d 885, 888 (1954).

In support of its position the Court below relied on our domestic scheme of taxation in Sections 161 and 162 of the 1939 Code. These provisions were designed to provide fair and convenient administration of our domestic income tax laws in the case of estates and trusts and the beneficiaries of trusts, and to insure that income of an estate or trust is to be taxed to either the fiduciary or the beneficiary, and that it may not escape tax by falling in some way between the two. *Freuler v. Helvering*, *supra*; *Helvering v. Butterworth*, *supra*. To impose the tax with respect to accumulated income of a trust on the beneficiaries would create hardship, but not to tax it in the hands of the trustee would permit outright avoidance. On the other hand, to tax income in the hands of a trustee which, but for the intervention of the trust, would be exempt should not, in the absence of clear intent to the contrary, be allowed in applying Article XIV of the treaty. Our revenue laws no doubt intend to tax the entire income of a trust, but always sub-

ject to the limitation "unless definitely exempted". *Helvering v. Butterworth*, *supra*; *Estate of Emily Tait v. Commissioner*, discussed on p. 36, *supra*.

Unquestionably the negotiators could have drafted Article XIV in such manner either to exclude all gains on the sale of property held in trust by a United States trustee, or to exclude gains which are accumulated for future distribution. But Article XIV was not so drafted. Unlike the provisions in the treaty providing particular rules for other types of income (such as in Articles VI, VII, VIII and IX), Article XIV contains no express requirement that the gains, to be exempt, must be "derived by" or "realized by" the United Kingdom resident.

There is no reasonable justification for distinguishing between legal and equitable interests in applying the exemption in respect of capital gains. Indeed, it would contradict the whole scheme of the Convention to import such a distinction in Article XIV, since, in a number of instances, the Convention disregards the identity of the technical "taxpayer" under our domestic law in order to establish broad equitable rules and mutual reciprocity of treatment. See Articles III(3), IV, VI and XIII.

(b) It is irrational to make a distinction between distributable and undistributed capital gains in applying the treaty exemption.

In looking only to see who is the formalistic "taxpayer" under United States law, the Court below was forced to make a distinction between distributable gains (which he held were exempt) and accumulated gains (which he held were not within the exemption). This is a wholly irrational distinction under an international treaty exemption broad enough to embrace both.

In both instances the gains arise on the sale of property held in trust: the trustee holds the legal title of the

property sold; the trustee decides whether a sale shall be made, and if so, when and at what prices; the trustee is accountable, in the case of an improvident sale, to the life beneficiary or to the remainderman, as the case may be. In the case of a distributable gain, the trust property sold is not first distributed and the sale made by the distributee; the sale is made by the trustee and only the gain is distributed. In one instance the life beneficiary is the formal taxpayer and in the other the trustee is the formal taxpayer. But in both instances the economic burden of the tax falls on the beneficiaries and not upon the trustee.

Whether the gain is distributable or not distributable, the trustee acts in a representative capacity only. In either case he shifts the economic burden of the tax. In the former case the life beneficiary bears the economic burden for he must pay the tax, unless exempt. In the latter case, while the trustee initially pays the tax, the economic burden of the tax is shifted to the remaindermen, unless they are exempt. Whichever way the tax may be shifted, either to the life beneficiary or to the remainderman, the controlling factor, in all equity and justice, should be whether he upon whom the economic burden of the tax falls is exempt, not whether the trustee is exempt.

From the standpoint of equity and natural justice, there is no inherent reason for exempting distributable gains and taxing gains retained for future distribution, which ultimately will be distributed. Under our statutory law, income of a trust which is currently distributable to a charitable organization is exempt, and in the case of a charitable remainder the retained and undistributed income is exempt in the hands of the trustee (p. 36, *supra*). There is no reason why the same rule should not apply under a treaty exempting residents of the United Kingdom from the United States tax on capital gains. It is inconceivable that the negotiators of the United Kingdom did not intend

that the exemption follow the ultimate burden rather than apply only where the United Kingdom resident is formally "the taxpayer".

Furthermore, where profit arises on the sale of property held in trust, in the absence of any direction in the trust instrument the profit is distributable or is retained for future distribution depending upon the law of the state under which the trust is created, which varies between states. Surely an exemption in an international treaty should be applied uniformly throughout the United States and not made dependent upon the differing laws of the several states. Such a result is quite unthinkable.

(c) The Swedish treaty and its analysis in the *Lewenhaupt* case recently before this Court serves to show that under the United Kingdom Convention the status of the trustee is not controlling.

In final analysis the reasoning and the conclusions of law of the Court below rest upon the continued right of the United States to impose the capital gains taxes on the plaintiff-trustee, a United States corporation, notwithstanding the United Kingdom Convention and as though it had not come into effect. This perhaps would have been true had the United Kingdom Convention contained the standard "saving clause" appearing in all of our income tax conventions negotiated prior to the United Kingdom Convention and in virtually all of our income tax conventions negotiated since.¹² Its omission in the United Kingdom Convention is of the utmost significance.

¹² The "saving clause" has appeared in all our income tax conventions prior to the United Kingdom Convention, namely, Canada (March 4, 1942—56 Stat. 1399); France (July 25, 1939—59 Stat. 893); and Sweden (March 23, 1939—54 Stat. 1759). Since the United Kingdom Convention, all of the 15 subsequent conventions have included a saving clause except the conventions with New Zealand, Ireland and Australia.

This so-called "saving clause" expressly secures to the United States the right to impose United States income, excess profits taxes and surtaxes upon its citizens, or residents or corporations, "notwithstanding any other provisions of this convention" and "as though this convention had not come into effect", but securing to the United States citizen the foreign tax credit on account of foreign taxes, if any, imposed upon such citizen.

Thus under our income tax convention with Sweden, effective January 1, 1940 (54 Stat. 1759), which was before this Court in *Lewenhaupt v. Commissioner*, 20 T. C. 151 (1953), affirmed *per curiam*, 221 F. 2d 227 (1955), "for the reasons given by the Tax Court", Article XIV provided:

"It is agreed that double taxation shall be avoided in the following manner:

(a) Notwithstanding any other provisions of this convention, the United States of America in determining the income and excess-profits taxes, including all surtaxes, of its citizens or residents or corporations, may include in the basis upon which such taxes are imposed all items of income taxable under the revenue laws of the United States of America as though this convention had not come into effect. The United States of America shall, however, deduct the amount of the taxes specified in Article I (b) (1) and (3) of this convention or other like taxes from the income tax thus computed but not in excess of that portion of the income tax liability which the taxpayer's net income taxable in Sweden bears to his entire net income."

There was a similar and reciprocal provision securing the same rights to Sweden under Swedish law.

The Swedish treaty and all our other treaties containing the saving clause are important, not because of the specific issue arising under it and involved in the *Lewenhaupt* case, but because of the effect which the Tax Court gave to the presence of the saving clause on the right of the United

States to impose taxes upon its own citizens, residents and corporations in accordance with the provisions of our domestic revenue laws and irrespective of the treaty provisions.

In the *Lewenhaupt* case a Swedish citizen realized a capital gain on the sale of real estate located in the United States. Article IX of the Swedish treaty provides that gains derived from the sale of capital assets in the United States by a resident of Sweden "shall be exempt from taxation in" the United States when such resident has no permanent establishment in the United States. But Article V states that capital gains derived from the sale of real estate "shall be taxable only in the contracting State in which the real property is situated".

If the general exemption under Article IX was controlling, there would have been no tax on the gain, United States or Swedish, but if the general exemption did not include gains on real estate sales, the United States could collect one tax under our statutory law taxing gains on the sale of real estate situated in the United States. The Tax Court upheld the tax on the latter theory, adding, however, that on the facts found the taxpayer in any event did not qualify for exemption under Article IX as he had a permanent establishment in the United States.

In its consideration of the Swedish treaty, the Tax Court stated at the outset (p. 160): "The purpose of the tax convention is the avoidance of double taxation"; continuing, the Tax Court said "It was not designed, as the petitioner urges here, to exempt a class of income from taxation by both of the contracting states". Quoting from the Senate Executive Report on the treaty, the Tax Court pointed out that "each specific item of income [was] made subject to tax in one or the other of the two countries but not in both". The Tax Court concluded that Article XIV

of the Convention [above quoted] “was made the key provision” by means of which the avoidance of double taxation, *i.e.*, the imposition of one tax but not two, was rendered possible.

That is to say, the presence of the saving clause in the Swedish treaty served to permit either the United States or Sweden, as the case might be, to continue to tax its own citizens and residents in accordance with the respective revenue laws of each nation, “notwithstanding any other provision of this convention” and “as though this convention had not come into effect”.

Assuming that the same issue as is here involved had arisen under the Swedish treaty, the saving clause probably would have preserved the right of the United States to tax the plaintiff-trustee under our domestic scheme of taxing trusts. But in the absence of any saving clause, the clear implication of the Tax Court’s analysis of the Swedish treaty in the *Lewenhaupt* case is that no rights under United States law are preserved, aside from rights expressly secured to the United States in the treaty itself.

In reading into the United Kingdom Convention the standard saving clause, the Court below said (R. 30) that there is nothing in the tax convention that would not warrant the defendant in following United States law. On the contrary, absent the saving clause, there is nothing *in* the Convention which *does* warrant the application of United States law. Our domestic revenue laws should not be invoked to limit an otherwise all embracing treaty exemption. This would appear to be the declared policy of Congress in view of the presence in our statutory law of Section 22(b)(7).

The United Kingdom Convention is quite unlike the Swedish treaty and prior treaties in a number of material

respects. In many instances, double taxation is eliminated but, unlike the former treaties, the United Kingdom treaty does not invariably insure the imposition of one tax. In a number of cases it relieves the item of income from taxation by either nation, as in Articles XIV, XV and XVI. It does not contain the standard saving clause, although such a saving clause was ready at hand had the contracting parties intended to preserve to the United States (and to the United Kingdom) the rights secured under it. Its omission is persuasive evidence that the United Kingdom was unwilling to accept it, and intended that the treaty should be applied in accordance with its terms, unaffected by our statutory law.

For example, Article XIII, for the purposes of the foreign tax credits, permits a United States stockholder of a British corporation to take into account the British standard tax paid by the British corporation to the British Treasury, contrary to United States statutory law as interpreted by the Supreme Court in the *Biddle* case (discussed above, p. 25). This was done to insure complete reciprocity in respect of the taxes imposed by the two nations on corporate earnings. Had a saving clause been inserted in the treaty, it would probably have vitiated Article XIII. Without it, the rule of the treaty definitely controls. So in the case of Article XIV. If the treaty exempts the capital gains here involved, as we submit it does, the treaty must control, without regard to our domestic statutory law.

THE ADMINISTRATIVE REGULATIONS UNDER THE TWO TREATIES

Before leaving the Swedish treaty and the *Lewenhaupt* case, it seems appropriate to consider briefly the administrative regulations issued under the two treaties and the sanctions for such regulations.

Article XXI of the Swedish treaty expressly authorizes "The competent authorities of the two contracting States" to prescribe "regulations necessary to interpret and carry out the provisions of the Convention."¹³ Thus the regulations issued under the Swedish treaty have the express sanction of the treaty itself.

This is not the case in respect of the United Kingdom treaty. Unlike the Swedish treaty, the United Kingdom treaty contains no authority for the issuance of administrative regulations. T. D. 5569 was promulgated under the general power in Section 62 of the 1939 Code, authorizing the Commissioner to issue regulations "for the enforcement of this chapter", namely, the income tax chapter of our domestic Revenue Code.

There is treaty authority for the weight which the Tax Court gave to the administrative regulations under the Swedish treaty. But in the absence of any express sanction in the United Kingdom treaty for administrative regulations, Section 7.519(c) of T. D. 5569 (quoted above on p. 4) is to be viewed with skepticism insofar as it falls short of giving full recognition to Article XIV, certainly where the rights of a United Kingdom remainderman are involved.

But whatever the weight of T. D. 5569 may be, the regulation is not "conclusive upon courts called upon to construe" a treaty, *Factor v. Laubenheimer*, 290 U. S. 276, 295 (1933); and a regulation which "operates to create a rule out of harmony with the statute, is a mere nullity". *Manhattan General Equipment Co. v. Commissioner*, 297 U. S.

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"ARTICLE XXI

The competent authorities of the two contracting States may prescribe regulations necessary to interpret and carry out the provisions of this convention. * * *

129, 134 (1936). The courts repeatedly have refused to follow administrative regulations.¹⁴

We should perhaps point out a patent defect in the language of the regulation. It is stated that a United Kingdom resident "who is a beneficiary of a domestic trust" shall be entitled to the exemption or reductions in the rate of tax with respect to "dividends, interest, royalties, natural resource royalties, rentals from real property and capital gains" when such items are included in his distributed share "if he is taxable in the United Kingdom on such income and is not engaged in trade or business in the United States through a permanent establishment". Capital gains realized by a trust are not subject to tax in the United Kingdom, whether the trust is a United Kingdom trust or a United States trust. Thus, the qualify-

¹⁴ See, for example, *Trust of Bingham v. Commissioner*, 325 U. S. 365 (1945); *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129 (1936); *Campbell v. Galeno Chemical Co.*, 281 U. S. 599 (1930); *Lynch v. Tilden Co.*, 265 U. S. 315 (1924); *International Railway Co. v. Davidson*, 257 U. S. 506 (1922); *United States v. Grimaud*, 220 U. S. 506 (1911); *Williamson v. United States*, 207 U. S. 425 (1908); *Commissioner v. Mills*, 183 F. 2d 32 (9th Cir. 1950), affirming 12 T. C. 468 (1949); *Rickenberg v. Commissioner*, 177 F. 2d 114 (9th Cir. 1949), *cert. denied* 338 U. S. 949; *Essick v. United States*, 88 F. Supp. 23 (S. D. Calif. 1949), *appeal dismissed per stip.*, 9th Cir. Aug. 29, 1950; *Commissioner v. Philip J. LoBue*, 223 F. 2d 367 (3d Cir. 1955), affirming 22 T. C. 440 (1954); *Commissioner v. Produce Reporter Co.*, 207 F. 2d 586 (7th Cir. 1953), affirming 18 T. C. 69 (1952); *Commissioner v. Clark*, 202 F. 2d 94 (7th Cir. 1953), affirming 17 T. C. 1357 (1952); *Lincoln Electric Co. Employees' Profit-Sharing Trust v. Commissioner*, 190 F. 2d 326 (6th Cir. 1951); *Kimbrell's Home Furnishings, Inc. v. Commissioner*, 159 F. 2d 608 (4th Cir. 1947); *Burnet v. Marston*, 57 F. 2d 611 (App. D. C. 1932), affirming 18 B. T. A. 558; *Higgins v. Foster*, 12 F. 2d 646 (2d Cir. 1926); *Community Water Service Co. v. Commissioner*, 32 B. T. A. 164 (1935). In at least one case the Government itself in effect attacked the treasury regulations and the Court of Appeals for the Fifth Circuit upheld the Government. *F. H. E. Oil Co. v. Commissioner*, 147 F. 2d 1002 (5th Cir. 1945).

ing clause "if he is taxable in the United Kingdom on such income", while appropriate in the case of the other recited items, is entirely inappropriate in respect to a capital gain. Indeed the treaty itself imposes the same limitation with the sole exception of capital gains under Article XIV.

Only one other provision of T. D. 5569 is at all pertinent. Section 7.514 sets forth the specific classes of income from sources within the United States which are considered exempt under the Convention. Among these are :

"(g) Gains from the sale or exchange of capital assets by a nonresident alien who is a resident of the United Kingdom or by a foreign corporation managed and controlled in the United Kingdom, if such alien or corporation has no permanent establishment in the United States."

This subparagraph is appropriate when applied in the case of property directly owned by a resident of the United Kingdom. It does not undertake to apply to property held in trust, which is specifically dealt with in Section 7.519(c). But if Section 7.514(g) were considered as having general application, its limited language, "Gains from the sale * * * of capital assets by a nonresident alien", does not reflect the broad language of Article XIV, "A resident of the United Kingdom * * * shall be exempt from United States tax on gains from the sale * * * of capital assets". Section 7.514(g) is certainly not fully responsive to the language of the treaty exemption.

II

AN INTERNATIONAL CONVENTION WILL BE LIBERALLY CONSTRUED, AND IF IT ADMITS OF TWO CONSTRUCTIONS THE RIGHTS CLAIMED UNDER IT WILL PREVAIL.

The claim here involved is in substance a claim made by a resident of the United Kingdom under an income tax Convention between the United Kingdom and the United States. In the case of any doubt arising as to the meaning of the treaty, it is now firmly established under a long line of Supreme Court decisions that the treaty will be liberally construed, and where the treaty admits of two constructions, one restrictive of the rights that may be claimed under it and the other more favorable, the more favorable will prevail.

This principle has its origin in the Constitution of the United States and the inherent nature of an international treaty. Article VI, Clause 2, of our Constitution declares that the Constitution, the Laws of the United States made in pursuance thereof and all Treaties "shall be the supreme Law of the Land". Since a treaty and an act of Congress are put upon the same footing, it has been held that where a conflict arises between a treaty and a federal statute, the later in point of time will prevail, although a mere re-enactment of an existing statute does not displace the treaty. *Cook v. United States*, 288 U. S. 102, 118 (1933); *United States v. Lee Yen Tai*, 185 U. S. 213 (1902). Here, however, necessarily there can be no conflict between the United Kingdom treaty and our Revenue Code inasmuch as Section 22(b)(7) expressly excludes from gross income and makes exempt "Income of any kind, to the extent required by any treaty obligation * * *."

The rules for the construction of a treaty differ from the rules construing a taxing statute or a private contract. Of course the search for the intent of the contracting par-

ties is of primary importance, and in determining such intent all of the provisions of the treaty must be examined in the light of the attendant and surrounding circumstances. *In re Ross*, 140 U. S. 453, 457 (1891); *Rocca v. Thompson*, 223 U. S. 317, 331 (1912).

But here the similarity of the rules for construction end. The Supreme Court, recognizing that a treaty constitutes a solemn compact between two independent and sovereign nations, each motivated by a desire to protect its own nationals, has repeatedly declared that a treaty will be accorded a liberal construction so as to carry out the intent of the contracting parties and secure the evident purpose of the treaty, namely, equality and reciprocity. Further, the Supreme Court decisions make it perfectly clear that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other more favorable to the claimant, the latter is to be preferred.

An early and leading case is *Geofroy v. Riggs*, 133 U. S. 258 (1890). In the *Geofroy* case a treaty with France insured equality between the nationals of the two countries with respect to the possession and disposal of personal and real property "in all the states of the union", and, with respect to France, "within its territories". The claimant, a citizen of France, asserted the right to inherit real estate in the District of Columbia. Unless the phrase "states of the union" included such political bodies as the District of Columbia and our territories, full reciprocity would not be attained. In upholding the claimant the Supreme Court said (p. 271):

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such re-

stricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."

In announcing the rule set forth in the final sentence of the above quotation, the Supreme Court cited *Hauenstein v. Lynham*, 100 U. S. 483, 487 (1879). In the *Lynham* case, which involved a treaty with Switzerland, the Supreme Court categorically stated:

"Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks v. Dupont*, 3 Pet. 242. Such is the settled rule in this court."

The Supreme Court decisions have never departed from these principles. The leading cases are *Jordan v. Tashiro*, 278 U. S. 123 (1928); *Nielsen v. Johnson*, 279 U. S. 47 (1929), and *Factor v. Laubenheimer*, 290 U. S. 276 (1933). The later decisions have reaffirmed these principles. See *Choctaw Nation v. U. S.*, 318 U. S. 423, 431 (1943); *Bacardi Corp. v. Domenech*, 311 U. S. 150, 163 (1940); *Valentine v. Neidecker*, 299 U. S. 5, 10 (1936).

By the very nature of an international treaty, reciprocity and equality of treatment between the nationals of the two contracting parties is a major purpose. Assuredly, the negotiators for the United Kingdom had in mind the interests of their own nationals in agreeing to the language of Article XIV. In the absence of any capital gains taxes in the United Kingdom on gains realized on property held in trust, the purpose of the United Kingdom negotiators was to accomplish reciprocity so far as reciprocity could be accomplished. But if any doubt arises as to the extent of the exemption claimed by non-residents of the United Kingdom under Article XIV, the construction most favorable to the claimant should, we submit, prevail.

III

THROUGHOUT THE YEAR OF SALE ALL THE REMAINDERMEN QUALIFIED AS CITIZENS AND RESIDENTS OF THE UNITED KINGDOM SO THAT THE CAPITAL GAINS WERE WITHIN THE EXEMPTION, DESPITE THE REMOTE POSSIBILITY OF A CHANGE IN EXEMPT STATUS OR A FUTURE SHIFTING OF INTEREST WITHIN THE CLOSED CLASS.

The remote possibility of a change of exempt status in later years, or the possibility of a future shifting of interest within the closed class, does not affect the exemption.

Throughout 1946, the year when the sale occurred, all the beneficiaries were citizens and residents of the United Kingdom and fully qualified within the treaty. Had the sale in 1946 involved securities owned in legal ownership, the status of the seller in the year of sale would have controlled, regardless of any likelihood of his losing his status in later years. The same would be true with respect to distributable gains on the sale of property in trust. There is no logical basis for a different rule when the gains are retained if all the remaindermen throughout the year of sale are citizens and residents of the United Kingdom.

Analogous situations exist under our revenue laws and the Convention itself. Under Section 162(a) of our Code and Regulations 118, Section 39.162-1, income of a trust, including capital gains, "paid or permanently set aside" for a charity is exempt. *Hopkins v. Commissioner*, 13 T. C. 952 (1949). In view of the language "permanently set aside", the bequest must be free from any possibility of failure. Both the courts and the Treasury view as controlling the exempt status of the remainderman during the taxable year when the capital gain is realized. S. M. 4644,

V-1 Cum. Bull. 277; A. R. R. 521, 4 Cum. Bull. 221. The same rule is applied in the case of estate taxes where there is a bequest to a qualified charity, even though in a later year the charity may lose its exemption by engaging in "prohibited transactions". See Regulations 105, Section 81.46.

Under the United Kingdom Convention, Article XVI exempts a United Kingdom corporation from United States tax on its accumulated and undistributed earnings if throughout the last half of the taxable year United Kingdom residents control, directly or indirectly, more than 50% of the voting stock. There is no requirement that the stockholders must be residents of the United Kingdom in the year when such stockholders ultimately receive the accumulated earnings either by dividend or liquidation. The facts existing at the time the tax is imposed are controlling.

In any event, in view of the admissions in the answer (R. 10-11, 18) and the findings of the Court below (R. 42-4) there is little or no likelihood that prior to the death of the four life beneficiaries (Florence's children) the lineal descendants of Florence will not remain citizens and residents of the United Kingdom.

The second possibility is a change of interest by deaths and births within the class. The trust was irrevocable and the gifts over were limited to a class embracing the lineal descendants of the testator's niece, Florence (R. 37-8).

Under the so-called New York rule and the rule of the *Restatement of Property*, on the birth of the first grandchild of Florence (John Baring, in 1934—R. 39) the remainder vested in him and remained vested subject to contraction or divestment by later births or deaths within the class. The New York rule grew out of the New York courts' interpretation of the New York Property Law defining vested and contingent remainders enacted in 1830 (Rev. Stat. N. Y., Part II, Chap. 1), which provided:

“§ 13. Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.”

In 1896 the plural was changed to the singular. It now appears as Section 40 of the New York Property Law (McKinney's Consolidated Laws of N. Y. Annotated).

The leading New York cases are: *Moore v. Littel*, 41 N. Y. 66 (1869); *Baker v. Lorillard*, 4 N. Y. (4 Comst.) 257 (1850); *Coster v. Lorillard*, 14 Wend. (N. Y.) 265, 301-2 (1835); *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811 (1894); *Crackanthorpe v. Sickles*, 156 App. Div. 753, 141 N. Y. Supp. 370 (1st Dep't 1913); *United States Trust Co. v. Wheeler*, 73 App. Div. 289, 76 N. Y. Supp. 707 (1st Dep't 1902), *aff'd*, 173 N. Y. 631, 66 N. E. 1117 (1903).

California has adopted the New York rule. The California Code was enacted in 1872, and the Code followed precisely the language of the New York definitions, except for the interpolation of the words “defeasible or indefeasible” in the third line of the definition of a vested remainder. Sections 694 and 695 provide:

“§ 694. Vested interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

§ 695. Contingent interests. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.”

Thus under Section 695 of the California Code the remainder of the Tevis trust was contingent until the birth

in 1934 of John Baring, the first grandchild. Upon that event, Section 694 was satisfied since "there is a person in being who would have a right", whether "defeasible or indefeasible", to "the immediate possession of the property" upon "the ceasing of the precedent estate".

The California courts interpreting Sections 694 and 695 have followed the New York courts and adopted the New York rule. *In re DeVries*, 17 Cal. App. 184, 119 Pac. 109 (1911), citing and quoting (p. 202) from the leading New York case of *Moore v. Littel*, *supra*; *Gray v. Union Trust Co.*, 171 Cal. 637, 154 Pac. 306 (1915), citing and quoting from *Crackanthorpe v. Sickles*, *supra*.

Thus in 1946 when the sale here involved occurred, the five grandchildren of Florence had an equitable vested remainder, and although the interest might shift due to later deaths and births within the class, the class was closed and embraced only the lineal descendants of Florence, all citizens and residents of the United Kingdom.

As we have already seen (pp. 37-42, *supra*), such an interest constitutes equitable ownership and such ownership embraced the ownership of the capital gains here involved. These gains represented in substance income to the equitable owners, all of whom qualified as residents of the United Kingdom.

Having in mind the broad reach of Article XIV as evidenced by its language, the evident intent to accomplish full reciprocity and equality of tax treatment so far as such reciprocity was attainable, the equitable ownership of the capital gains which the United Kingdom remaindermen enjoyed and the undoubted economic tax burden which would otherwise fall upon them, we respectfully submit that such gains were intended to be and are under Article XIV of the treaty and Section 22(b)(7) of our Code "exempt from United States tax".

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed with costs, and that it be ordered and adjudged that judgment should be entered in favor of the plaintiff in the sum of \$570,957.86, with interest thereon as provided by law, as prayed for in the complaint.

Respectfully submitted,

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Dated: San Francisco, January 31, 1957.

No. 15339

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN TRUST COMPANY, a Corporation,
Plaintiff-Appellant,
vs.

JAMES G. SMYTH, Collector of Internal Revenue,
and UNITED STATES OF AMERICA,
Defendants-Appellees.

**APPENDIX ACCOMPANYING BRIEF FOR
PLAINTIFF-APPELLANT**

**(Containing the United Kingdom Convention and
Sections 161 and 162 of the 1939 Code)**

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FILE
JAN 30 195
PAUL P. O'BRIEN

**THE OFFICIAL TEXT OF THE INCOME TAX CON-
VENTION BETWEEN THE UNITED STATES AND
THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND (60 STAT. 1377)**

Convention between the United States of America and the United Kingdom respecting double taxation and taxes on income and protocol. Signed at Washington April 16, 1945, and June 6, 1946, respectively; ratification advised by the Senate of the United States of America June 1, 1946, and June 19, 1946, respectively; ratified by the President of the United States of America June 26, 1946; ratifications exchanged at Washington July 25, 1946; proclaimed by the President of the United States of America July 30, 1946.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income was signed by their respective Plenipotentiaries at Washington on April 16, 1945;

AND WHEREAS a supplementary protocol modifying in certain respects the said convention was signed by the respective Plenipotentiaries of the United States of America and the United Kingdom of Great Britain and Northern Ireland at Washington on June 6, 1946;

AND WHEREAS the originals of the said convention and the said supplementary protocol are word for word as follows:

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

Have appointed for that purpose as their Plenipotentiaries:

The Government of the United States of America:

Mr. Edward R. Stettinius, Jr., Secretary of State, and

The Government of the United Kingdom of Great Britain and Northern Ireland:

The Right Honorable the Earl of Halifax, K.G., Ambassador Extraordinary and Plenipotentiary in Washington,

Who, having exhibited their respective full powers, found in good and due form, have agreed as follows:

ARTICLE I

(1) The taxes which are the subject of the present Convention are:

(a) In the United States of America:

The Federal income taxes, including surtaxes and excess profits taxes (hereinafter referred to as United States tax).

(b) In the United Kingdom of Great Britain and Northern Ireland:

The income tax (including surtax), the excess profits tax and the national defense contribution (hereinafter referred to as United Kingdom tax).

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the government of any territory to which the present Convention is extended under Article XXII.

ARTICLE II

(1) In the present Convention, unless the context otherwise requires:

- (a) The term “United States” means the United States of America, and when used in a geographical sense means the States, the Territories of Alaska and of Hawaii, and the District of Columbia.
- (b) The term “United Kingdom” means Great Britain and Northern Ireland, excluding the Channel Islands and the Isle of Man.
- (c) The terms “territory of one of the Contracting Parties” and “territory of the other Contracting Party” means the United States or the United Kingdom as the context requires.
- (d) The term “United States corporation” means a corporation, association or other like entity created or organized in or under the laws of the United States.
- (e) The term “United Kingdom corporation” means any kind of juridical person created under the laws of the United Kingdom.
- (f) The terms “corporation of one Contracting Party” and “corporation of the other Contracting Party” mean a United States corporation or a United Kingdom corporation as the context requires.
- (g) The term “resident of the United Kingdom” means any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom.

- (h) The term “resident of the United States” means any individual who is resident in the United States for the purposes of United States tax and not resident in the United Kingdom for the purposes of United Kingdom tax, and any United States corporation and any partnership created or organized in or under the laws of the United States, being a corporation or partnership which is not resident in the United Kingdom for the purposes of United Kingdom tax.
- (i) The term “United Kingdom enterprise” means an industrial or commercial enterprise or undertaking carried on by a resident of the United Kingdom.
- (j) The term “United States enterprise” means an industrial or commercial enterprise or undertaking carried on by a resident of the United States.
- (k) The terms “enterprise of one of the Contracting Parties” and “enterprise of the other Contracting Party” mean a United States enterprise or a United Kingdom enterprise, as the context requires.
- (l) The term “permanent establishment” when used with respect to an enterprise of one of the Contracting Parties means a branch, management, factory or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. An enterprise of one of the Contracting Parties shall not be deemed to have a permanent establishment in the territory of the other Contracting Party merely because it carries on business dealings in the territory of such other Contracting Party through a *bona fide* commission agent, broker or custodian acting in the

ordinary course of his business as such. The fact that an enterprise of one of the Contracting Parties maintains in the territory of the other Contracting Party a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute such fixed place of business a permanent establishment of such enterprise. The fact that a corporation of one Contracting Party has a subsidiary corporation which is a corporation of the other Contracting Party or which is engaged in trade or business in the territory of such other Contracting Party (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation.

(2) For the purposes of Articles VI, VII, VIII, IX and XIV a resident of the United Kingdom shall not be deemed to be engaged in trade or business in the United States in any taxable year unless such resident has a permanent establishment situated therein in such taxable year. The same principle shall be applied, *mutatis mutandis*, by the United Kingdom in the case of a resident of the United States.

(3) In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

ARTICLE III

(1) A United Kingdom enterprise shall not be subject to United States tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the United States through a permanent establishment situated

therein. If it is so engaged, United States tax may be imposed upon the entire income of such enterprise from sources within the United States.

(2) A United States enterprise shall not be subject to United Kingdom tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, United Kingdom tax may be imposed upon the entire income of such enterprise from sources within the United Kingdom: Provided that nothing in this paragraph shall affect any provisions of the law of the United Kingdom regarding the imposition of United Kingdom excess profits tax and national defence contribution in the case of inter-connected companies.

(3) Where an enterprise of one of the Contracting Parties is engaged in trade or business in the territory of the other Contracting Party through a permanent establishment situated therein, there shall be attributed to such permanent establishment the industrial or commercial profits which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment, and the profits so attributed shall, subject to the law of such other Contracting Party, be deemed to be income from sources within the territory of such other Contracting Party.

(4) In determining the industrial or commercial profits from sources within the territory of one of the Contracting Parties of an enterprise of the other Contracting Party, no profits shall be deemed to arise from the mere purchase of goods or merchandise within the territory of the former Contracting Party by such enterprise.

ARTICLE IV

Where an enterprise of one of the Contracting Parties by reason of its participation in the management, control or capital of an enterprise of the other Contracting Party, makes with or imposes on the latter, in their commercial or financial relations, conditions different from those which would be made with an independent enterprise, any profits which would but for those conditions have accrued to one of the enterprises but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

ARTICLE V

(1) Notwithstanding the provisions of Articles III and IV of the present Convention, profits which an individual (other than a citizen of the United States) resident in the United Kingdom or a United Kingdom corporation derives from operating ships documented or aircraft registered under the laws of the United Kingdom, shall be exempt from United States tax.

(2) Notwithstanding the provisions of Articles III and IV of the present Convention, profits which a citizen of the United States not resident in the United Kingdom or a United States corporation derives from operating ships documented or aircraft registered under the laws of the United States, shall be exempt from United Kingdom tax.

(3) This Article shall be deemed to have superseded, on and after the first day of January, 1945, as to United States tax, and on and after the 6th day of April, 1945, as to United Kingdom tax, the arrangements relating to reciprocal exemption of shipping profits from income tax effected between the Government of the United States and the Government of the United Kingdom by exchange of Notes dated August 11, 1924, November 18, 1924, November 26, 1924, January 15, 1925, February 13, 1925 and March 16, 1925, which shall accordingly cease to have effect.

ARTICLE VI

(1) The rate of United States tax on dividends derived from a United States corporation by a resident of the United Kingdom who is subject to United Kingdom tax on such dividends and not engaged in trade or business in the United States shall not exceed 15 percent: Provided that such rate of tax shall not exceed five percent if such resident is a corporation controlling, directly or indirectly, at least 95 percent of the entire voting power in the corporation paying the dividend, and not more than 25 percent of the gross income of such paying corporation is derived from interest and dividends, other than interest and dividends received from its own subsidiary corporations. Such reduction of the rate to five percent shall not apply if the relationship of the two corporations has been arranged or is maintained primarily with the intention of securing such reduced rate.

(2) Dividends derived from sources within the United Kingdom by an individual who is (a) a resident of the United States, (b) subject to United States tax with respect to such dividends, and (c) not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom surtax.

(3) Either of the Contracting Parties may terminate this Article by giving written notice of termination to the other Contracting Party, through diplomatic channels, on or before the thirtieth day of June in any year after the year 1945, and in such event paragraph (1) hereof shall cease to be effective as to United States tax on and after the first day of January, and paragraph (2) hereof shall cease to be effective as to United Kingdom tax on and after the 6th day of April, in the year next following that in which such notice is given.

ARTICLE VII

(1) Interest (on bonds, securities, notes, debentures, or on any other form of indebtedness) derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax on such interest and not engaged in trade or business in the United States, shall be exempt from United States tax; but such exemption shall not apply to such interest paid by a United States corporation to a corporation resident in the United Kingdom controlling, directly or indirectly, more than 50 percent of the entire voting power in the paying corporation.

(2) Interest (on bonds, securities, notes, debentures, or on any other form of indebtedness) derived from sources within the United Kingdom by a resident of the United States who is subject to United States tax on such interest and not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom tax; but such exemption shall not apply to such interest paid by a corporation resident in the United Kingdom to a United States corporation controlling, directly or indirectly, more than 50 percent of the entire voting power in the paying corporation.

ARTICLE VIII

(1) Royalties and other amounts paid as consideration for the use of, or for the privilege of using, copyrights, patents, designs, secret processes and formulae, trademarks, and other like property and derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax on such royalties or other amounts and not engaged in trade or business in the United States, shall be exempt from United States tax.

(2) Royalties and other amounts paid as consideration for the use of, or for the privilege of using, copyrights, patents, designs, secret processes and formulae, trade-

marks, and other like property, and derived from sources within the United Kingdom by a resident of the United States who is subject to United States tax on such royalties or other amounts and not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom tax.

(3) For the purposes of this Article the term "royalties" shall be deemed to include rentals in respect of motion picture films.

ARTICLE IX

(1) The rate of United States tax on royalties in respect of the operation of mines or quarries or of other extraction of natural resources, and on rentals from real property or from an interest in such property, derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax with respect to such royalties or rentals and not engaged in trade or business in the United States, shall not exceed 15 percent: Provided that any such resident may elect for any taxable year to be subject to United States tax as if such resident were engaged in trade or business in the United States.

(2) Royalties in respect of the operation of mines or quarries or of other extraction of natural resources, and rentals from real property or from an interest in such property, derived from sources within the United Kingdom by an individual who is (a) a resident of the United States, (b) subject to United States tax with respect to such royalties and rentals, and (c) not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom surtax.

ARTICLE X

(1) Any salary, wage, similar remuneration, or pension, paid by the Government of the United States to an individual (other than a British subject who is not also a citizen of the United States) in respect of services rendered to the United States in the discharge of governmental functions, shall be exempt from United Kingdom tax.

(2) Any salary, wage, similar remuneration, or pension, paid by the Government of the United Kingdom to an individual (other than a citizen of the United States who is not also a British subject) in respect of services rendered to the United Kingdom in the discharge of governmental functions, shall be exempt from United States tax.

(3) The provisions of this Article shall not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting Parties for purposes of profit.

ARTICLE XI

(1) An individual who is a resident of the United Kingdom shall be exempt from United States tax upon compensation for personal (including professional) services performed during the taxable year within the United States if (a) he is present within the United States for a period or periods not exceeding in the aggregate 183 days during such taxable year, and (b) such services are performed for or on behalf of a person resident in the United Kingdom.

(2) An individual who is a resident of the United States shall be exempt from United Kingdom tax upon profits, emoluments or other remuneration in respect of personal (including professional) services performed within the United Kingdom in any year of assessment if (a) he is present within the United Kingdom for a period or periods

not exceeding in the aggregate 183 days during that year, and (b) such services are performed for or on behalf of a person resident in the United States.

(3) The provisions of this Article shall not apply to the compensation, profits, emoluments or other remuneration of public entertainers such as stage, motion picture or radio artists, musicians and athletes.¹

ARTICLE XII

(1) Any pension (other than a pension to which Article X applies), and any life annuity, derived from sources within the United States by an individual who is a resident of the United Kingdom shall be exempt from United States tax.

(2) Any pension (other than a pension to which Article X applies), and any life annuity, derived from sources within the United Kingdom by an individual who is a resident of the United States shall be exempt from United Kingdom tax.

(3) The term "life annuity" means a stated sum payable periodically at stated times, during life or during a specified or ascertainable period of time, under an obligation to make the payments in consideration of money paid.

ARTICLE XIII

(1) Subject to section 131 of the United States Internal Revenue Code as in effect on the first day of January, 1945, United Kingdom tax shall be allowed as a credit against United States tax. For this purpose, the recipient of a dividend paid by a corporation which is a resident of the United Kingdom shall be deemed to have paid the

¹ See Protocol signed by June 6, 1946, *post*, p. 1389.

United Kingdom income tax appropriate to such dividend if such recipient elects to include in his gross income for the purposes of United States tax the amount of such United Kingdom income tax.

(2) Subject to such provisions (which shall not affect the general principle hereof) as may be enacted in the United Kingdom, United States tax payable in respect of income from sources within the United States shall be allowed as a credit against any United Kingdom tax payable in respect of that income. Where such income is an ordinary dividend paid by a United States corporation, such credit shall take into account (in addition to any United States income tax deducted from or imposed on such dividend) the United States income tax imposed on such corporation in respect of its profits, and where it is a dividend paid on participating preference shares and representing both a dividend at the fixed rate to which the shares are entitled and an additional participation in profits, such tax on profits shall likewise be taken into account in so far as the dividend exceeds such fixed rate.

(3) For the purposes of this Article, compensation, profits, emoluments and other remuneration for personal (including professional) services shall be deemed to be income from sources within the territory of the Contracting Party where such services are performed.

ARTICLE XIV

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.

ARTICLE XV

Dividends and interest paid on or after the first day of January 1945 by a United Kingdom corporation shall be exempt from United States tax except where the recipient is a citizen of or a resident of the United States or a United States corporation.

ARTICLE XVI

A United Kingdom corporation shall be exempt from United States tax on its accumulated or undistributed earnings, profits, income or surplus, if individuals who are residents of the United Kingdom control, directly or indirectly, throughout the last half of the taxable year, more than 50 percent of the entire voting power in such corporation.

ARTICLE XVII

(1) The United States income tax liability for any taxable year beginning prior to January 1, 1936, of any individual (other than a citizen of the United States) resident in the United Kingdom, or of any United Kingdom corporation, remaining unpaid on the date of signature of the present Convention, may be adjusted on a basis satisfactory to the United States Commissioner of Internal Revenue: Provided that the amount to be paid in settlement of such liability shall not exceed the amount of the liability which would have been determined if

- (a) the United States Revenue Act of 1936 (except in the case of a United Kingdom corporation in which more than 50 percent of the entire voting power was controlled, directly or indirectly, throughout the latter half of the taxable year, by citizens or residents of the United States), and
- (b) Articles XV and XVI of the present Convention, had been in effect for such year. If the taxpayer was not, within the meaning of such Revenue Act,

engaged in trade or business in the United States and had no office or place of business therein during the taxable year, the amount of interest and penalties shall not exceed 50 percent of the amount of the tax with respect to which such interest and penalties have been computed.

(2) The United States income tax unpaid on the date of signature of the present Convention for any taxable year beginning after the thirty-first day of December 1935 and prior to the first day of January 1945 in the case of an individual (other than a citizen of the United States) resident of the United Kingdom, or in the case of any United Kingdom corporation shall be determined as if the provisions of Articles XV and XVI of the present Convention had been in effect for such taxable year.

(3) The provisions of paragraph (1) of this Article shall not apply—

- (a) unless the taxpayer files with the Commissioner of Internal Revenue on or before the thirty-first day of December 1947 a request that such tax liability be so adjusted and furnishes such information as the Commissioner may require; or
- (b) in any case in which the Commissioner is satisfied that any deficiency in tax is due to fraud with intent to evade the tax.

ARTICLE XVIII

A professor or teacher from the territory of one of the Contracting Parties who visits the territory of the other Contracting Party for the purpose of teaching, for a period not exceeding two years, at a university, college, school or other educational institution in the territory of such other Contracting Party shall be exempted by such other Contracting Party from tax on his remuneration for such teaching for such period.

ARTICLE XIX

A student or business apprentice from the territory of one of the Contracting Parties who is receiving full-time education or training in the territory of the other Contracting Party shall be exempted by such other Contracting Party from tax on payments made to him by persons within the territory of the former Contracting Party for the purposes of his maintenance, education or training.

ARTICLE XX

(1) The taxation authorities of the Contracting Parties shall exchange such information (being information available under the respective taxation laws of the Contracting Parties) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment and collection of the taxes which are the subject of the present Convention. No information shall be exchanged which would disclose any trade secret or trade process.

(2) As used in this Article, the term "taxation authorities" means, in the case of the United States, the Commissioner of Internal Revenue or his authorized representative; in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorized representative; and, in the case of any territory to which the present Convention is extended under Article XXII, the competent authority for the administration in such territory of the taxes to which the present Convention applies.

ARTICLE XXI

(1) The nationals of one of the Contracting Parties shall not, while resident in the territory of the other Contracting Party, be subjected therein to other or more burdensome taxes than are the nationals of such other Contracting Party resident in its territory.

(2) The term “nationals” as used in this Article means

(a) in relation to the United Kingdom, all British subjects and British protected persons, from the United Kingdom or any territory with respect to which the present Convention is applicable by reason of extension made by the United Kingdom under Article XXII; and

(b) in relation to the United States, United States citizens, and all persons under the protection of the United States, from the United States or any territory to which the present Convention is applicable by reason of extension made by the United States under Article XXII;

and includes all legal persons, partnerships and associations deriving their status as such from, or created or organized under, the laws in force in any territory of the Contracting Parties to which the present Convention applies.

(3) In this Article the word “taxes” means taxes of every kind or description, whether national, Federal, state, provincial or municipal.

ARTICLE XXII

(1) Either of the Contracting Parties may, at the time of exchange of instruments of ratification or thereafter while the present Convention continues in force, by a written notification of extension given to the other Contracting Party through diplomatic channels, declare its desire that

the operation of the present Convention shall extend to all or any of its colonies, overseas territories, protectorates, or territories in respect of which it exercises a mandate, which impose taxes substantially similar in character to those which are the subject of the present Convention. The present Convention shall apply to the territory or territories named in such notification on the date or dates specified in the notification (not being less than sixty days from the date of the notification) or, if no date is specified in respect of any such territory, on the sixtieth day after the date of such notification, unless, prior to the date on which the Convention would otherwise become applicable to a particular territory, the Contracting Party to whom notification is given shall have informed the other Contracting Party in writing through diplomatic channels that it does not accept such notification as to that territory. In the absence of such extension, the present Convention shall not apply to any such territory.

(2) At any time after the expiration of one year from the entry into force of an extension under paragraph (1) of this Article, either of the Contracting Parties may, by written notice of termination given to the other Contracting Party through diplomatic channels, terminate the application of the present Convention to any territory to which it has been extended under paragraph (1), and in such event the present Convention shall cease to apply, six months after the date of such notice, to the territory or territories named therein, but without affecting its continued application to the United States, the United Kingdom or to any other territory to which it has been extended under paragraph (1) hereof.

(3) In the application of the present Convention in relation to any territory to which it is extended by notification by the United States or the United Kingdom references to the "United States" or, as the case may be, the "United Kingdom" shall be construed as references to that territory.

(4) The termination in respect of the United States or the United Kingdom of the present Convention under Article XXIV or of Article VI shall, unless otherwise expressly agreed by both Contracting Parties, terminate the application of the present Convention or, as the case may be, that Article to any territory to which the Convention has been extended by the United States or the United Kingdom.

(5) The provisions of the preceding paragraphs of this Article shall apply to the Channel Islands and the Isle of Man as if they were colonies of the United Kingdom.

ARTICLE XXIII

(1) The present Convention shall be ratified and the instruments of ratification shall be exchanged at Washington as soon as possible.

(2) Upon exchange of ratifications, the present Convention shall have effect

- (a) as respects United States tax, for the taxable years beginning on or after the first day of January 1945;
- (b) (i) as respects United Kingdom income tax, for the year of assessment beginning on the 6th day of April 1945 and subsequent years; (ii) as respects United Kingdom surtax, for the year of assessment beginning on the 6th day of April 1944 and subsequent years; and (iii) as respects United Kingdom excess profits tax and national defense contribution, for any chargeable accounting period beginning on or after the first day of April 1945 and for the unexpired portion of any chargeable accounting period current at that date.

ARTICLE XXIV

(1) The present Convention shall continue in effect indefinitely but either of the Contracting Parties may, on or before the 30th day of June in any year after the year 1946, give to the other Contracting Party, through diplomatic channels, notice of termination and, in such event, the present Convention shall cease to be effective

- (a) as respects United States tax, for the taxable years beginning on or after the first day of January in the year next following that in which such notice is given;
- (b) (i) as respects United Kingdom income tax, for any year of assessment beginning on or after the 6th day of April in the year next following that in which such notice is given; (ii) as respects United Kingdom surtax, for any year of assessment beginning on or after the 6th day of April in the year in which such notice is given; and (iii) as respects United Kingdom excess profits tax and national defence contribution, for any chargeable accounting period beginning on or after the first day of April in the year next following that in which such notice is given and for the unexpired portion of any chargeable accounting period current at that date.

(2) The termination of the present Convention or of any Article thereof shall not have the effect of reviving any treaty or arrangement abrogated by the present Convention or by treaties previously concluded between the Contracting Parties.

IN WITNESS WHEREOF the above-mentioned Plenipotentiaries have signed the present Convention and have affixed thereto their seals.

DONE at Washington, in duplicate, on the 16th day of April, 1945.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

[SEAL]

E R STETTINIUS JR

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND:

[SEAL]

HALIFAX.

PROTOCOL

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to conclude a supplementary Protocol modifying in certain respects the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income which was signed at Washington on April 16, 1945,

Have agreed as follows:

ARTICLE I

Paragraph (3) of Article XI of the Convention of April 16, 1945 for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income shall be deemed to be deleted and of no effect.

ARTICLE II

This Protocol, which shall be regarded as an integral part of the said Convention, shall be ratified and the instruments of ratification thereof shall be exchanged at Washington.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being authorized thereto by their respective Governments, have signed this Protocol and have affixed thereto their seals.

DONE at Washington, in duplicate, this sixth day of June, 1946.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

[SEAL]

JAMES F BYRNES
Secretary of State
of the United States of America

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

[SEAL]

JOHN BALFOUR.
His Majesty's
Envoy Extraordinary and Minister Plenipotentiary
in Washington

AND WHEREAS the said convention and the said supplementary protocol have been ratified by both Governments, and the instruments of ratification of the two Governments were exchanged at Washington on the twenty-fifth day of July, 1946;

AND WHEREAS it is provided in Article XXIII of the said convention that upon the exchange of instruments of ratification the convention shall have effect as respects United States tax, for the taxable years beginning on or after the first day of January 1945, and shall have effect as respects United Kingdom income tax, for the year of assessment beginning on the sixth day of April 1945 and subsequent years, and shall have effect as respects United Kingdom surtax, for the year of assessment beginning on the sixth day of April 1944 and subsequent years, and shall have effect as respects United Kingdom excess profits tax and national defense contribution, for any chargeable ac-

counting period beginning on or after the first day of April 1945 and for the unexpired portion of any chargeable accounting period current at that date;

AND WHEREAS it is provided in Article II of the said supplementary protocol that the protocol shall be regarded as an integral part of the said convention;

Now, THEREFORE, be it known that I, Harry S. Truman, President of the United States of America, do hereby proclaim and make public the said convention and the said supplementary protocol to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America, and by the citizens of the United States of America, and all other persons subject to the jurisdiction thereof, the said convention as modified by the said supplementary protocol being deemed to have effect as provided in Article XXIII of the said convention, as aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this thirtieth day of July in the year of our Lord one thousand nine
[SEAL] hundred forty-six and of the Independence of the United States of America the one hundred seventy-first.

HARRY S. TRUMAN

By the President:

DEAN ACHESON

Acting Secretary of State

**MATERIAL PARTS OF SECTIONS 161 AND 162
OF OUR INTERNAL REVENUE CODE AS THEY
APPEARED IN 1946**

Section 161. Imposition of Tax.

(a) Application of tax.—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and payment.—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

Section 162. Net income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized

by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

No. 15339

In the United States Court of Appeals
for the Ninth Circuit

AMERICAN TRUST COMPANY, A CORPORATION, APPELLANT

v.

JAMES G. SMYTH, COLLECTOR OF INTERNAL REVENUE,
AND UNITED STATES OF AMERICA, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

BRIEF FOR THE APPELLEES

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FILED

FEB 27 1957

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15339

AMERICAN TRUST COMPANY, A CORPORATION, APPELLANT

v.

JAMES G. SMYTH, COLLECTOR OF INTERNAL REVENUE,
AND UNITED STATES OF AMERICA, APPELLEES

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA*

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the District Court (R. 24-31) is reported in 141 F. Supp. 414.

JURISDICTION

This appeal involves federal income taxes for 1946 in the amount of \$570,957.86, plus interest. The taxes in controversy were paid in quarterly installments between March 14, 1947, and December 11, 1947, to James G. Smyth, then Collector of Internal Revenue for the First District of California. (R. 33-34.) Taxpayer filed a claim for refund on November 28, 1949, which

was disallowed by the Commissioner of Internal Revenue on April 25, 1952. (R. 34.) Within the time provided by Section 3772(a)(2), Internal Revenue Code of 1939, and on April 21, 1954, taxpayer filed a complaint in the United States District Court, Northern District of California, Northern Division, for recovery of the taxes paid. (R. 3-16.) Jurisdiction was conferred on the District Court under 28 U.S.C., Section 1346(a)(1). On June 4, 1956, the District Court issued a "Memorandum For Judgment" (R. 24-31) which concluded by stating (R. 31): "Judgment is awarded to defendant, with his costs of suit incurred herein. Counsel for defendants shall present findings, conclusions and a judgment". This was filed on June 5, 1956. Findings of fact, conclusions of law and formal judgment were filed and entered July 30, 1956. (R. 49-50.) On September 14, 1956, taxpayer filed a notice of appeal. (R. 50-51.) Jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Article XIV of the Income Tax Convention between the United States and the United Kingdom provides for exemption for residents of the United Kingdom not engaged in trade or business in the United States from a tax on capital gains.

The question is whether an American banking corporation which was trustee under the will of a deceased California resident is exempt from federal taxation imposed on the trust with respect to income attributable to capital gains realized in the United States where the trust income was not currently distributable and where the then living beneficiaries and remaindermen under

the trust (on whom no tax is imposed) were all residents of the United Kingdom.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent statutes and other authorities involved will be found in the Appendix, *infra*.

STATEMENT

The undisputed facts as found by the District Court may be summarized as follows:

Taxpayer was a corporation organized under the laws of California with its principal office in San Francisco, and as such, it was authorized to act and has acted since February 28, 1938, as trustee of a testamentary trust created by one Harry L. Tevis, who died on July 19, 1931. (R. 32-33.)

In 1946 taxpayer sold shares of stock of Kern County Land Company and other securities comprising part of the corpus of the trust and realized gross long-term capital gains of \$2,302,733.54, and net long-term capital gains taken into account in the aggregate sum of \$1,141,915.72. Under California law these gains were not distributable to the life beneficiaries of the trust but were required to be and were retained by the taxpayer as trustee as part of the corpus of the trust. (R. 33.)

On March 14, 1947, taxpayer filed a fiduciary income tax return for 1946 in which it reported the gains and paid income taxes thereon in the total sum of \$570,957.86, the payments being made in quarterly installments. (R. 33-34.)

On November 28, 1949, taxpayer filed a claim for refund which was on April 25, 1952, disallowed by the Commissioner. (R. 34.)

On July 19, 1931, Harry L. Tevis, late of Santa Clara

County, California, died testate, and on July 26, 1935, his will was admitted to probate in that County. (R. 34-35.) On the date of his death decedent was unmarried. Under his will he bequeathed certain specific legacies in cash to named individuals, created four trusts in equal amounts for each of the four sons of his brother, William S. Tevis, and a fifth trust in equal amount for one Edwin Lee Dunlap. (R. 35.) The rest and residue of all property owned by the decedent at his death was bequeathed in trust one-half to his niece, Florence Fermor-Hesket, and the remaining half to Florence's children born before decedent's death with remainders over (R. 35), for the purposes and the trustee to have the powers as follows (R. 37-38):

To receive the rents, issues and profits and income of the trust estate, and to pay the net rents, issues, profits and income therefrom in equal shares to the children of my niece Florence Fermor-Hesketh born before my death, or to the survivor or survivors of them during their lives, respectively.

If any of the said children of my said niece, Florence Fermor-Hesketh shall have predeceased me leaving issue living at my death, my said trustee shall forthwith transfer, pay over and deliver to the said issue of each of said children who predeceases me (and there is hereby given, devised and bequeathed to the issue living at my death of each of said children of my niece who shall predecease me) one of as many portions of said corpus of the trust aforesaid as shall be ascertained by adding together the number of children of my said niece living at my death and the number of her

children who predecease me leaving issue living at my death.

If after my death and of the said children of my niece born before my death shall die leaving issue, then there shall be transferred, paid over and delivered to such issue (and in that event there is hereby given, devised and bequeathed to such issue) one of as many parts of the aforesaid trust fund as shall be ascertained by adding together the number of the children of my niece living at my death and the number of her children who predecease me leaving issue living at my death.

If upon the death of the last of the children of my said niece born before my death and after the issue of each of them who left issue either living at my death, or born thereafter, shall have received the portion of the trust fund which it is hereinabove provided shall be delivered to them, there shall be any overplus in the hands of such trustee, said overplus shall be then transferred, paid over and delivered (and, in that event, there is hereby given, devised and bequeathed) to the then living issue of the said children of my said niece in equal shares per capital and not per stirpes.

It was further provided that the word "children" wherever used in the will meant and included only the first generation of direct lineal descendants. The word "issue" wherever used in the will meant and included direct lineal descendants of all generations. (R. 38.)

Taxpayer succeeded the original trustee appointed under the will on February 28, 1938, and since that date has been the duly qualified and acting trustee of the trust just above referred to and has held and possessed

the corporate shares and securities constituting the corpus of the trust including the shares and securities which it sold in 1946. (R. 36.)

Florence Fermor-Hesketh, the decedent's niece had five children all of whom were born prior to the decedent's death, namely Thomas S. Fermor-Hesketh, born October 7, 1910; Louise Fermor-Hesketh Stockdale, born December 15, 1911; Flora Fermor-Hesketh Lawson, born February 23, 1913; Frederick Fermor-Hesketh, born April 18, 1916, and John Brekenridge Fermor-Hesketh, born March 7, 1917. Thomas S. Fermor-Hesketh died on June 21, 1937, without issue. The decedent's niece, Florence Fermor-Hesketh had no child or children who predeceased the decedent and at the time of the decedent's death no child of the niece had predeceased the decedent leaving issue living at the decedent's death. (R. 38-39.)

During the calendar year 1946, the living direct lineal descendants of the children of the niece, Florence Fermor-Hesketh, were the two children of Louise Fermor-Hesketh Stockdale, namely: Ann Louise Stockdale, born May 30, 1938, and Thomas Stockdale, born January 7, 1940; and the three children of Florence Fermor-Hesketh Lawson, namely: John Baring, born August 16, 1934, James Baring, born August 16, 1938 (sons by a former marriage), and Arabella Ann Lawson, born August 14, 1946. All of these direct lineal descendants were and are unmarried. (R. 39.)

Thomas S. Fermor-Hesketh until his death, and each of the four living children of Florence Fermor-Hesketh born prior to decedent's death, and each of the children of such children referred to above, were on the date of decedent's death, and have been continu-

ously since such death residents of the United Kingdom of Great Britain and Ireland, and were not engaged in trade or business in the United States. (R. 39-40.)

The four living children of Florence Fermor-Hesketh and her grandchildren were all born, domiciled in and were subjects and residents of the United Kingdom and since the dates of their respective births they have continued to be domiciled in and are subjects and residents of the United Kingdom and have lived continuously in the United Kingdom. (R. 40.)

Under the terms of the trust, and under the laws of the State of California, the proceeds from the sales of the securities sold by the trustee were required to be and were retained as part of the corpus of the trust and income taxes, if any, arising from such sales, were chargeable against the corpus of the trust. (R. 40.)

The securities were held for more than six months prior to their sale and constituted capital assets. The capital gains realized on such sale amounted to \$2,302,733.54, and after adjustments on account of certain long and short-term capital losses in respect to other securities sold and the application of capital losses carried over from 1945, the net capital gains taken into account from such sales amounted to \$1,141,915.72. (R. 41.)

The final decree of distribution by the Superior Court distributing the property under the will of the decedent was entered on July 26, 1935. (R. 36.) The corpus of the trust created under decedent's will particularly referred to above constituted a portion of the property of the decedent distributed to the trustee under that final decree. (R. 41.)

The children and grandchildren of Florence Fermor-

Hesketh were in 1946, and always have been citizens of the United Kingdom of Great Britain and Northern Ireland and never have been citizens of the United States. They have always been residents of the United Kingdom for the purpose of United Kingdom income taxes and were not in 1946, and never have been, residents of the United States for the purposes of the United States income tax. Such children and grandchildren were not and never have been engaged in trade or business in the United States, and they never have had a permanent establishment situated within the United States. (R. 41-42.)

The Fermor-Hesketh family grew out of the union in 1846 of two old English families, namely the Hesketh family and the Fermor family. In 1846 Lady Anna Maria Arabella Fermor married Sir Thomas George Hesketh, and by royal license dated November 8, 1867, Sir Thomas Hesketh and his son, Thomas George were authorized to take the surname of Fermor, and from such date their descendants have borne the name of Fermor-Hesketh. (R. 42.) Florence Fermor Hesketh was born in California on December 31, 1881, and was the daughter of the late John Witherspoon Breckenridge of California. In 1909 she married Sir Thomas Fermor-Hesketh, Baronet, an English citizen and resident in England, and since her marriage she has been a citizen of the United Kingdom and resides therein. Her husband died on July 20, 1944. (R. 42.)

Louise Fermor-Hesketh Stockdale, her daughter, was born in England on December 15, 1911, was educated in England and has lived in England all her life. On July 24, 1937, she married Edmund Villiers Min-

shall Stockdale, a citizen of the United Kingdom and of a British family who is a banker, stock broker, Justice of the Peace and sheriff in the City of London. All of his relatives and his close friends and those of his wife are residents of England and are English people. The two now occupy an estate in Hampshire, comprised of substantial land holdings and their three children are being educated in English schools. (R. 42-43.)

Flora Fermor-Hesketh Lawson was born in England on February 23, 1913, and was educated and lived all her life in England. In 1934 she married Rupert Baring, a citizen of the United Kingdom and their two sons are now being educated at Eton College. They lived in London until 1944 when Flora divorced her husband, who never remarried. Following the divorce, Flora married Commander Arnold Derek Arthur Lawson, a citizen of the United Kingdom who has always resided in England, and she has two daughters by this marriage who were born in London and who have always lived in England. Since their marriage the Lawsons acquired substantial properties and a residence in Buckinghamshire, England. Mr. Lawson was a former solicitor in London but has now retired. Close friends and relatives of the divorced husband and of the Lawsons all reside in England. (R. 43.)

Frederick Fermor-Hesketh was born in England in 1916, has always resided in England and was educated in schools and colleges in England. In 1949 he married Christian Mary McEwen, a citizen of the United Kingdom and a resident of England. The three children by this marriage have always lived in England. (R. 44.)

John Breckenridge Fermor-Hesketh was born in England in 1917, and since his birth has been a citizen

of the United Kingdom and a resident of England. He was educated in schools and colleges in England, and in 1946 he married Patricia Macaskie Cole, an English citizen and resident of England. They have no children. Most of the friends of Mr. and Mrs. John Breckenridge Fermor-Hesketh reside in England. Since 1946 Mr. Fermor-Hesketh some times accompanied by his wife has spent two or three months each year in California looking after certain of his mother's affairs. (R. 44.)

With the exception of John Breckenridge Fermor-Hesketh, the business connections of the members of the Fermor-Hesketh family noted above were almost wholly limited to the United Kingdom and the close friends and members of the Fermor-Hesketh family reside in and are citizens of the United Kingdom. John Breckenridge Fermor-Hesketh has some business interests and friends in California. The bulk of his business and family connections are in England and his close friends reside in and are citizens of the United Kingdom. (R. 44.)

Article XIV of the Income Tax Convention between the United States and the United Kingdom, proclaimed by the President of the United States on July 30, 1946, and effective January 1, 1945 (60 Stat. 1377), provides as follows (R. 40):

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States taxes on gains from the sale or exchange of capital assets.

In 1944 and 1945, and at all times thereafter, the United Kingdom income tax and the United Kingdom

surtax were charged upon annual income derived by any person residing in the United Kingdom from any source whatever, and upon annual income derived by any person from sources within the United Kingdom whether or not the resident was a British subject or a resident of the United Kingdom. (R. 45.)

During 1944 and 1945, and at all times thereafter, under the income taxation system in the United Kingdom, a tax was imposed upon income but not upon realized accretions of capital and a resident or nonresident individual, a corporation or a trustee of an express trust who realized gains or profits on the sale of securities or real or other property in the United Kingdom was not chargeable with income tax, excess profits tax or national defense contributions unless what was done was not merely a realization or change in investment but was an act done in what was truly the carrying on of a business. Subject to the foregoing an accretion of capital was not taxable merely because the general capital was invested in the hope and expectation that it would rise in value, and if it did rise in value, the realization on sale did not result in taxable income. (R. 45-46.)

If the sales made by taxpayer as trustee in 1946 had been made by a trustee of a trust created in the United Kingdom, in terms of the trust involved in these proceedings there would have been a realization on and changes in investment within the provisions described in the foregoing paragraph and the gains and profits realized thereon would not have been subject to United Kingdom income tax. (R. 46.)

When the United Kingdom Tax Convention was entered into, under the United Kingdom tax system

there was an income tax (at the standard rate), a surtax, an excess profits tax and a so-called national defense contribution. During 1944 and 1945, under the United Kingdom system of taxation, corporate profits arising under United Kingdom corporations were subject to income tax at a standard rate of 50% and a national defense contribution of 5% unless the excess profits tax on the corporate profits exceeded the national defense contribution and such taxes were paid to the United Kingdom Treasury. When the corporation later declared a dividend to its stockholders it was entitled to deduct therefrom an amount equal to tax at the standard rate on the amount of the dividend. A shareholder or stockholder was not assessable for taxes at the standard rate of the dividend but was required to pay the surtax on the full amount of the dividend (including the amount of the standard tax attributable to the dividend) except that after the effective date of the Income Tax Convention between the United Kingdom and the United States, a resident of the United States was exempted from the United Kingdom surtax in terms of Article VI(2) of the Convention. (R. 46-47.)

During 1944 and 1945, the United Kingdom tax at the standard rate in respect of royalties from mines and other natural resources and rentals from real property, derived from sources within the United Kingdom was imposed on the amount of such royalties and rentals after relevant deductions and allowances at 50%. (R. 47.)

Prior to the United Kingdom Income Tax Convention, credits against the United Kingdom tax on account of foreign taxes paid were not allowed under United Kingdom law except where income arises to a

person resident in the United Kingdom from securities other than Dominion or Colonial securities out of the Kingdom or from stocks or shares or certain other forms of possession other than Dominion or Colonial, out of the Kingdom and chargeable to income tax at the standard rate though not remitted to this Kingdom, a deduction was allowed in computing the amount of chargeable income of any sum which had been paid in respect of income tax in the place where the income had arisen. As a matter of judicial decision it was held that to be so deductible the foreign tax must have been a tax on the income charged to the United Kingdom income tax. This, however, was not to be considered as a credit of tax against tax. (R. 47-48.)

During 1944 and 1945, the United Kingdom did not impose a tax in respect of dividends and interest paid by a United States corporation to a nonresident of the United Kingdom including residents of the United States even though such United States corporations derived income from sources within the United Kingdom and the United Kingdom did not impose taxes upon the accumulated or undistributed profits or surplus of a United States corporation except in the case of certain tax avoidance schemes. (R. 48.)

On the basis of its findings of fact, the District Court concluded that the taxpayer trustee was taxable on the capital gains realized from the sale of the securities and did not qualify for any exemption from taxation on such gains. (R. 48.) Taxpayer has appealed from the judgment of the District Court dismissing the taxpayer's complaint. (R. 50-51.)

SUMMARY OF ARGUMENT

Taxpayer was trustee under the will of a decedent who died a resident of California in 1931. The life beneficiaries and contingent remaindermen were residents of the United Kingdom. In 1946 taxpayer sold securities which were part of the trust corpus and realized capital gains. The proceeds of the sale under California law were not currently distributable but became part of the corpus of the trust, were hence not deductible by the trustee under the Internal Revenue Code, and the capital gains tax therefore was imposed upon the trust and not upon the beneficiaries of the trust.

Taxpayer as trustee was liable for the tax imposed on the trust on the capital gains as income accumulated for future distribution under Section 161 (a)(1), Internal Revenue Code of 1939, and the gains are not exempt under laws of the United Kingdom which only exempts capital gains realized by residents of the United Kingdom.

Section 161 (a)(1) specifically covers the transactions involved and the trust is not relieved from taxation simply because the beneficiaries were residents of the United Kingdom. There is nothing in Article XIV which conflicts with Section 161 (a)(1), or which repeals any of its provisions. The trust is a separate entity for tax purposes and its liability for United States taxes is not affected by the terms of the Convention which applies only so as to exempt resident taxable entities of the United Kingdom from capital gains tax imposed on them by the United States. Here the tax was on the trust and not the nonresident beneficiaries, so Article XIV is inapplicable. This construction is supported by a reading of the Convention as a

whole, and is consistent with the construction uniformly placed on Article XIV by the Treasury Department by Regulations effective ever since 1947. Taxpayer cites no controlling authority to the contrary and the cases it relies upon are all readily distinguishable on their facts.

ARGUMENT

Taxpayer, a Resident American Corporation, as Trustee, Was Liable for United States Taxes Imposed on the Trust for Capital Gains Realized on the Sale of Securities and Held for Future Distribution. No Treaty Exemption Exists Simply Because the Ultimate Remaindermen May Be Residents of Great Britain

Taxpayer was a California corporation engaged in the banking business in the United States and as such was authorized to act as trustee under express trusts. It became trustee under the will of a decedent who died a resident of California in 1931. Upon final distribution under the will of the decedent taxpayer became vested as trustee with the title to securities and in 1946 it sold some of these securities which it had held for more than six months, realizing net taxable capital gains in excess of one million dollars. Taxpayer contends that it is exempt from taxation on these gains because the life beneficiaries and contingent remaindermen of the trust were residents of the United Kingdom. Taxpayer's sole reliance is upon Article XIV of the Income Tax Convention between the United States and the United Kingdom which exempts "residents" of the United Kingdom from United States taxes on capital gains. We contend that the District Court correctly held that the taxpayer here does not fall within those provisions since the trust, on which the tax is imposed, is not a resident of the United Kingdom, as defined in

Article II(1)(g) of the Tax Convention, Appendix, *infra*, but was on the contrary subject to United States taxes under Section 161(a)(1), Internal Revenue Code of 1939, Appendix, *infra*.

1. Article XIV of the Convention, Appendix, *infra*, provides as follows:

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.

As can be readily seen, the crucial issue in the case necessarily centers on a resolution of the question whether the tax here in issue is being imposed on the remaindermen, as the taxpayer contends, or whether it is on the trust, as the District Court held. Since the exemption is one dealing *exclusively* with taxes imposed by the United States, it would seem fairly clear that the treaty intended that any such question should be answered only in relationship to the laws of the United States. We are fortified in this Article II(3) of the Convention, Appendix, *infra*, which states:

In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

As we shall show, the income realized in this case is not being taxed to the nonresident remaindermen but, on the contrary, is being taxed a resident trust and the tax is being paid by a domestic trustee. Consequently,

the exemption of Article XIV does not and cannot become applicable.

We turn, accordingly, to a consideration of our income tax, as it relates to trusts, to demonstrate why the conclusion of the lower court is correct.

For many years trusts and estates have been treated under the revenue laws as taxable entities which are separate from their beneficiaries and have been subject to taxation on their income at the same rates imposed upon individuals.¹

Section 161(a)(1), Internal Revenue Code of 1939, specifically provides that the income tax imposed by Chapter 1 of the Internal Revenue Code of 1939, upon individuals, shall apply to the income of estates or of any kind of property held in trust, including income accumulated for future distribution under terms of a will or trust.

Section 161(b), Internal Revenue Code of 1939, Appendix, *infra*, provides that the tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary (here the trustee) with certain exceptions not here applicable. The trustee here is clearly a fiduciary.²

Section 162(a), Internal Revenue Code of 1939, Ap-

¹ See Section 219, Revenue Act of 1918, c. 18, 40 Stat. 1057; Revenue Act of 1921, c. 136, 42 Stat. 227; Revenue Act of 1924, c. 234, 43 Stat. 253; and Revenue Act of 1926, c. 27, 44 Stat. 9; Section 161 Revenue Act of 1928, c. 852, 45 Stat. 781; Revenue Act of 1932, c. 209, 47 Stat. 169; Revenue Act of 1934, c. 277, 48 Stat. 680; Revenue Act of 1936 c. 690, 49 Stat. 1648; Revenue Act of 1938, c. 289, 52 Stat. 447, and the Internal Revenue Code of 1939, and Section 641 of the Internal Revenue Code of 1954.

² Section 3797 (a)(6), Internal Revenue Code of 1939, defines the term "fiduciary" to include a trustee or any person acting in any fiduciary capacity for any person.

pendix, *infra*, provides that the net income of an estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, with exceptions here in applicable.

Section 162(b), Internal Revenue Code of 1939, Appendix, *infra*, provides for allowances for additional deductions in computing the net income of an estate or trust for the amount of the income of the estate or trust which is distributable currently by the fiduciary to the legatees, heirs, or beneficiaries, and the amounts so distributable are required to be included in the net income of the legatees, heirs or beneficiaries, whether actually distributed to them or not.

It is well settled that a trust such as the taxpayer here is a separate entity from its beneficiaries and that under Sections 161 and 162, Internal Revenue Code of 1939, as such taxable entity it is required to file returns, report taxable income and pay taxes on a basis similar to that imposed upon individuals provided, however, it may claim some deductions as provided in Section 162, for current distributions to beneficiaries. *Helvering v. Butterworth*, 290 U.S. 365; *McCauley v. Commissioner*, 44 F. 2d 919 (C.A. 5th); *Anderson v. Wilson*, 289 U.S. 20; *Bankers' Trust Co. v. Bowers*, 295 Fed. 89 (C.A. 2d); *United States ex rel. Girard Co. v. Helvering*, 301 U.S. 540; *Freuler v. Helvering*, 291 U.S. 35, 41.

In *Helvering v. Butterworth*, *supra*, the Court stated (p. 369), referring to Section 219 of the Revenue Acts of 1924 and 1926, containing similar provisions to those involved in Section 161:

The evident general purpose of the statute was to tax in some way the whole income of all trust estates. * * * Certainly, Congress did not intend any

income from a trust should escape taxation unless definitely exempted.

In *McCauley v. Commissioner, supra*, the court stated (p. 920) :

Under the Revenue Act of 1913, a trustee was not required to pay a tax upon income derived from trust property, but the Revenue Act of 1916 treated a trustee as a taxable person.

The trustee is a separate taxable entity which does not act as a mere agent in the collection of the income but receives such income as a taxable entity in its own right and not as an agent or conduit for the beneficiaries. *Wittschen v. Commissioner*, 5 T. C. 10; *Vandermuhll v. Commissioner*, 29 B.T.A. 895, affirmed, 75 F. 2d 656 (C.A.D.C.); *Taylor v. Davis*, 110 U. S. 330.

In *Freuler v. Helvering, supra*, the Court stated (p. 41) with reference to the provisions of Section 219 (a), Revenue Act of 1921, which contain similar provisions to those in Section 161 (a), Internal Revenue Act of 1939:

Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. Thus the fiduciary may be required to accumulate; or on the other hand, he may be under a duty currently to distribute it. If the latter, then the scheme of the Act is to treat the amount so distributable, not as a trustee's income, but as the beneficiary's.

In summary, the trust is an entity separate from the donor or beneficiaries. Where the income is currently distributable, the tax is imposed on the beneficiaries and, under our progressive rate structure the amount of tax imposed on each beneficiary will be determined by the aggregate net income of the beneficiary from all sources. But where the income is to be accumulated, it would be difficult if not impossible to impose the tax on the beneficiary since the exact identity of the beneficiaries who will be able to receive the distribution cannot be known in the year when the trust earns the income and, indeed, as is true here, the year when distribution will be made cannot be known in advance. Consequently, the imposition of a progressive personal income tax on the unknown beneficiary would be impractical. Our scheme of taxation solves this problem by taxing the trust with income which is being accumulated, the rate of the tax being dependent on the net income of the trust as an entity and having no relationship to the current income of the putative beneficiaries. See 6 Mertens, Law of Federal Income Taxation, Sections 36.02, 36.35 and 36.36. Consequently, it is evident that no tax is imposed on any of the beneficiaries with respect to trust income which is being accumulated for future distribution.

Under California law it is clear that the gains from the sales of securities such as here involved were not distributable currently to the beneficiaries but were required to be held as part of the corpus of the trust until its final termination as required by the trust provisions. 3 Deering's California General Laws, Act 8696, Sec. 3, Appendix, *infra*; *Allen v. Commissioner*, 49 F. 2d 716 (C.A. 2d), certiorari denied, 284 U. S. 655; *Old Colony*

Trust Co. v. Commissioner, 38 B. T. A. 828; *Fulton's Ex'rs v. Commissioner*, 47 F. 2d 536 (C. A. D. C.).

Since the income involved here was required to be accumulated and was not currently distributable, the tax liability imposed by the United States does not fall upon these beneficiaries but upon the trust.³

In the case at bar, during the tax year involved, all of the life beneficiaries and contingent remaindermen of the trust were legal residents of the United Kingdom, and they were not engaged in trade or business in the United States through a permanent establishment. But the gain here in contemplation of law was the gain of the trust and the taxability of such gain is clearly governed by Sections 161 and 162, Internal Revenue Code of 1939. Under the foregoing statutory citations it is clear that the capital gains tax here involved was not imposed upon the nonresident beneficiaries and remaindermen, but interest was imposed upon the domestic trust with respect to income earned in this country, and the resident American Trust was responsible for paying the tax. The trustee had control over the trust corpus, sold the securities, realized the gains and had

³ The capital gains provisions of the Internal Revenue Code like other tax provisions are applicable to trusts. *Carter v. Hoey*, 180 F. 2d 353 (C.A. 2d), affirming 88 F. Supp. 765 (S.D. N.Y.); *In re Rogers' Estate*, 143 F. 2d 695 (C.A. 2d); *Armstrong v. Commissioner*, 38 B.T.A. 658; *Weigel v. Commissioner*, 96 F. 2d 387 (C.A. 7th). Similarly, capital losses are not deductible by the beneficiaries but must be taken by the trustee. *County National Bank & Trust Co. v. Commissioner*, 39 B. T. A. 357, reversed on other grounds, 122 F. 2d 29 (C.A. D.C.); *Peoples National Bank v. Commissioner*, 39 B.T.A. 565; *Bisbee v. Fahs*, 80 F. Supp. 929 (S.D. Fla.). Losses must be borne by an executor or trustee if realized in course of administration and not by the legatees or beneficiaries even in cases where legal title to the properties disposed of had actually vested in the beneficiaries or legatees. *Jones v. Whittington*, 194 F. 2d 812 (C.A. 10th); *Arrott v. Heiner*, 92 F. 2d 773 (C.A. 3d).

complete control and dominion over the proceeds. It is the trustee who was required to file tax returns and pay the capital gains tax.⁴

Clearly, since no tax was imposed on or payable by anyone who was a resident of the United Kingdom, Article XIV of the Convention can have no applicability, for an exemption from a United States tax can scarcely have been created in favor of persons who are not subject to a tax and on whom no tax has been imposed.

Section 3797(a)(14), Internal Revenue Code of 1939, Appendix, *infra*, defines a taxpayer as "any person subject to a tax imposed by this title." The trustee here is subject to the capital gains tax and is hence the taxpayer. The trustee's liability for the tax is not determinable by the status of the beneficiaries of the trust for tax purposes or by their equitable title in trust property. This is illustrated in the case of *Lloyd v. Delaney*, 86 F. Supp. 1001 (Mass.), affirmed, 181 F. 2d 941 (C.A. 1st), construing Section 421, Internal Revenue Code of 1939, which provided for abatement of income taxes of members of the armed service during the year of their death while on active service. It was held that such provisions did not exempt income collected by

⁴ Under Article II(2)(g) of the Tax Convention, Appendix, *infra*, the term "resident of the United Kingdom" is defined as meaning any person "(other than a citizen of the United States or a United States corporation) who is a resident in the United Kingdom for the purposes of the United Kingdom tax and not resident in the United States for the purpose of United States tax". A corporation is thus only to be regarded as a resident of the United Kingdom if its business is managed and controlled in the United Kingdom. It is clear that taxpayer does not qualify as a resident of the United Kingdom under Article II(1)(g) and hence does not fall under Article XIV.

a trustee of a service man who was killed in action, the trustee having been appointed under the will of the decedent's father, even though the beneficiary bore the brunt of the tax. The case illustrates the point which we make here that the mere fact that trust beneficiaries are exempt will not suffice to exempt the trust itself from the tax. See also *Jones v. Whittington*, 194 F. 2d 812 (C.A. 10th).

2. Taxpayer tacitly concedes that the tax here was properly imposed if the capital gains were not exempt under some treaty as provided in Section 22 (b)(7), Internal Revenue Code of 1939, Appendix, *infra*. The contention made by the taxpayer in support of its claims for exemption is that such gains are exempt from taxation under Article XIV of the Tax Convention between the United States and the United Kingdom.

Article XIV provides that a *resident* of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on capital gains. In the first place, Article XIV clearly does not apply here because the taxpayer was not a resident of the United Kingdom. Secondly, the taxpayer was engaged in a trade or business in the United States in the operation of its bank as trustee, and hence does not fall within the provisions of the article. Thirdly, the taxpayer sold the securities, realized the gain thereon and was required to pay the tax on such gains so that the beneficiaries who were not the taxpayers contemplated by Article XIV could not qualify for exemption, under any circumstances.

The Tax Convention between the United States and the United Kingdom signed on June 6, 1946, and pro-

claimed by the President on July 30, 1946, has the force and effect of federal statutory enactment. A treaty may supersede an Act of Congress just as an Act of Congress may supersede a treaty. *The Cherokee Tobacco*, 11 Wall 616; *Horner v. United States*, 143 U.S. 570. But treaties will not be regarded as destroying earlier statutes unless the purpose to abrogate these statutes is clearly expressed and unless the two are clearly incompatible. *Johnson v. Browne*, 205 U. S. 309; *Cook v. United States*, 288 U. S. 102. The Tax Convention under consideration deals with the exemption of citizens of the United States from British tax and citizens of Great Britain from United States tax on a reciprocal basis. It does not seek to deal with the internal system of taxation by the United States over its own individual citizens, trusts, estates or corporations which are all beyond its scope. Indeed, as we have previously observed, Article II(3) is an expression of policy that the Convention is to be construed in accordance with the laws of the country imposing a tax, except where the context otherwise requires a plain indication that the laws of the United States relative to taxation of trusts were not intended to be disturbed by the Convention. The provisions of the Convention seem clear enough in this regard but their scope and meaning have been also interpreted by the Treasury Regulations. The Treasury Department has prescribed Regulations interpreting the provisions of the Convention including its stated purpose and the capital gains provisions under Article XIV. See T. D. 5569, 1947-2 Cum. Bull. 100.⁵

⁵ These Regulations were promulgated pursuant to Section 62, Internal Revenue Code of 1939, Appendix, *infra*, which provides that the Commissioner with the approval of the Secretary shall

Section 7.514 of T. D. 5569, Appendix, *infra*, states that the primary purposes of the Convention to be accomplished on a reciprocal basis are the avoidance of double taxation upon major items of income derived from sources in one country by persons “resident” in another country and for the exchange of fiscal information complementary to other provisions of the Convention including those relating to avoidance of double taxation. The Convention thus seeks to avoid in certain cases double taxation upon residents of the United States with respect to taxation by the United Kingdom and upon residents of the United Kingdom with respect to taxation of income from sources within the United States. Of course neither situation is involved here since as we have pointed out, the income here is from sources within the United States and in contemplation of law realized by an American taxpayer and is not being taxed to the nonresident beneficiary. The income is not subject to taxation under the laws of the United Kingdom which does not tax the beneficiaries on it.

Section 7.519 (c) of T. D. 5569, Appendix, *infra*, provides that a non-resident alien who resides in the United Kingdom is entitled to exemption from capital tax gains under Article XIV of the Convention only to the extent that such gains are included in his distributive share of income of an estate or trust if he is taxable in the United Kingdom on such income and if

prescribe and publish all needful Rules and Regulations for the enforcement of Chapter 1 of the Internal Revenue Code of 1939 (which includes Section 22(b)(7), Internal Revenue Code of 1939, exempting income to the extent required by treaties) imposing income taxes. Pursuant thereto, the Treasury Department prescribed T. D. 5569, interpreting the provisions of the Convention here involved.

he is not engaged in trade or business in the United States through a permanent establishment. Under those provisions it would follow that if the capital gains had not been required to be held as part of the corpus of the trust and had been currently distributable to and included as income by the beneficiaries which is not the case here, this income to the beneficiaries would be exempt under the Regulations. However, the beneficiaries do not fall within the Regulations under the circumstances here involved because the capital gains are added to corpus of the trust and are not currently distributable. It is clearly the purpose of the Convention only to relieve such income from taxation where it constituted income as distinguished from corpus when received by residents of the United Kingdom.

It is well settled that in construing treaties the constructions placed on them by the Executive Department of the Government are entitled to great weight. Here the Regulations have been in full force and effect since 1947. The executive construction placed on Article XIV is clearly consistent with the article and such Regulations, if not conclusive, are entitled to the greatest weight and importance in considering the question involved. See *Charlton v. Kelly*, 229 U. S. 447; *Nielson v. Johnson*, 279 U. S. 40; *Ivancevic v. Artukovic*, 211 F. 2d 565 (C.A. 9th), certiorari denied, 348 U. S. 818, rehearing denied, 348 U. S. 889.

3. Reduced to its essentials, the taxpayer's argument is that the economic burden of the tax paid by the trust will eventually be borne by the beneficiaries, that, in creating the exemption under Article XIV, the Convention was not concerned with the domestic rules of taxation enacted by the United States, and that the

Convention did intend to create the exemption if the economic burden of the tax falls on a resident of the United Kingdom not engaged in trade or business in the United States. (Br. 17-20, 33-44.) The taxpayer also contends that such a construction of the Convention is necessary to achieve full reciprocity and points to other respects in which reciprocity was achieved by express provisions of the Convention. (Br. 20-32.)

These arguments will scarcely withstand analysis. There is nothing in the Convention or in its background to justify the assumptions that Article XIV intended to disregard the laws of the United States with respect to the entity on which the tax is imposed and to adopt some new concept of exemption which would turn on the probable future status of persons who might ultimately be economically disadvantaged by reason of a tax imposed in early years on another entity.

On the surface of things, the precise opposite would appear to be true. In the first place, Article XIV deals only with a tax imposed by the United States. If, in creating an exemption from that tax, the Convention had intended that the exemption should be applied out of regard to persons whom the United States did not purport to tax, it would be expected that an explicit provision would have been inserted to indicate that such a standard was to be applied. In negotiating the Convention (Br. 20-30) is misplaced. On the contrary, parties were familiar with this segment of the taxing system of the United States relating to the taxation of trusts. Consequently the failure to adopt any express provision which would require a departure from the concepts of the taxing pattern of the United States is a significant indication that none was intended—a conclusion which is reaffirmed by Article II(3).

The taxpayer's discussion of other provisions of the Convention (Br. 20-30) is misplaced. On the contrary, the fact that detailed provisions were required to deal with other problems where the solution of the Convention would collide with the domestic system of taxation of either country is persuasive indication that in Article XIV, where comparable provisions are absent, there was no intent to depart from our basic theory concerning the taxation of trust income being accumulated.

There is nothing to indicate that the Convention intended to adopt the economic burden test being urged by the taxpayer. Aside from the fact that, where federal and state immunities are concerned, the economic burden test has long been discarded.⁶ We need only discuss some of the almost impossible difficulties which such a test would have created. These difficulties, and the resulting confusion, indicate only the Convention, even under the most liberal approach, could not be given the meaning urged by the taxpayer.

The precise issue here being raised can only arise in cases where the income is realized and the tax on that income is imposed in *one year* and where the trust property will be distributed to persons in a *future year* to persons whose identity cannot yet be ascertained.⁷ And since the personal identity of these beneficiaries cannot be proved in advance, it is obviously impossible to be

⁶ See *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466; *James v. Dravo Contracting Co.*, 302 U. S. 134.

⁷ Even though the interest of the beneficiaries is "vested" either for the purpose of the rule against perpetuities or for any other purpose (see taxpayer's discussion (Br. 55-58)), it is obviously impossible to know in advance the identity of the persons who will be in existence at the time when the trust property is distributed.

certain that these persons will be residents of any particular country in the year when the distribution will take place. Did the Convention intend to impose on the courts of this country the burden of determining (a) in what year the distributions will take place; (b) who, precisely, will be the individuals who will receive the distribution, and in what shares; (c) of what country each of these individuals will be a resident; and (d) which of the individuals who will then be a resident of the United Kingdom will not be engaged in trade or business in the United States? And under what standards would this conjecture be based—only when the court can say for a certainty what the future holds (an obvious impossibility), or is the standard one of high probability—of most probability—or of mere possibility? And if any one of these standards is followed, what would be the situation if, at the time of distribution, it turns out that the facts are different and that some of the beneficiaries are not residents of the United Kingdom or are engaged in business in the United States? And what is the exemption where some of the putative beneficiaries are residents of the United Kingdom and others are not? Is the exemption to be allocated and must the court determine what shares will eventually be distributed to each when the relative size of these shares cannot be determined prior to the date of distribution?⁸

⁸ In the present case, it is true that all of these beneficiaries resided in the United Kingdom in 1946. The contingent remaindermen were also residents of the United Kingdom. We may speculate that these remaindermen will continue to reside in the United Kingdom and will be residents and citizens of Great Britain on the date of the termination of the trust, but since they may at any time move to the United States or elsewhere and since any one of them may

These are some of the difficult, perplexing problems which would necessarily attend the taxpayer's "economic burden" argument. The failure of the Convention to offer any guideposts or even to hint at some solution to these difficult problems is, we submit, compelling proof that the Convention never intended to encompass such a theory of tax immunity.

In this respect, it is also pertinent to observe that, with respect to the economic burden ultimately borne by the remaindermen, it would have been almost impossible to have achieved absolute reciprocity between the residents of the countries. Where a British trust accumulates income for future distribution to beneficiaries who turn out to be United States residents in the year of distribution, it is true that the distributable trust corpus will not have been diminished by the previous imposition of a capital gains tax. But there is no assurance under the Convention, and none was intended, that the burden of the British tax on the trust's ordinary income will not have been greater and the impact on the trust property will not have been more extensive than a tax (including one on capital gains) imposed by the United States on a trust in a reciprocal situation. These considerations, too, require rejection of the taxpayer's economic burden approach.

Taxpayer argues (Br. 52-54) that it is an established

become engaged in business in the United States, all this is mere conjecture. Imposition of the tax on the trust may reduce the corpus of the trust and thereby reduce the earning power of the trust so as to decrease the amount reinvestable in new securities held for the benefit of life beneficiaries. It may be inferred that by reason thereof the contingent remaindermen will later become adversely affected because of the reduced value of the corpus, although the extent of the effect or the year in which they would become so affected is speculative.

rule of construction that treaties should be liberally construed and that if any doubt exists a treaty will be construed in favor of rights claimed thereunder.

Taxpayer cites the case of *Geofroy v. Riggs*, 133 U. S. 258, 271, in support of its theory that a liberal construction should be given so "as to carry out the apparent intention of the parties to secure equality and reciprocity between them." The Court there stated that words in a treaty should be taken in their ordinary meaning as commonly understood and "not in any artificial or special sense impressed upon them by local law unless such restricted sense is clearly intended."

It is clearly the rule as stated by taxpayer (Br. 52-53) that in construing a doubtful treaty there must be a search for the intent of the parties and to ascertain this intent the treaty must be examined in light of all attendant circumstances to clear up any ambiguity or doubt. *Rocca v. Thompson*, 223 U. S. 317, 331. However, courts may not add provisions to a treaty through mere inferences alone to overrule existing laws unless the intent to do so is clearly expressed in the treaty. *Guaranty Trust Co. v. United States*, 304 U. S. 126; *Valentine v. United States ex rel. Neidecker*, 299 U. S. 5. Ambiguous treaties are construed similar to and according to the intent of the controlling parties as ascertained from an examination of all relevant factors. *Hidalgo County Water Control & Imp. Dist. v. Hedrick*, 226 F. 2d 1 (C. A. 5th); *Wright v. Henkel*, 190 U. S. 40.

It appears that much the same rules are followed in construing treaties that are used in construing statutes. We submit that the meaning of the Article here involved is so clear on its face that it is unnecessary to go

elsewhere to determine its meaning, but if any doubt existed as to its proper construction, the meaning we contend for here is abundantly clear as evidenced by the scope and purpose of the Convention, the construction placed on it by the Treasury Regulations and by the fact that as disclosed by the history of the Convention, there is not the slightest evidence that the contracting parties ever indicated an intent to repeal or modify any provisions of the United States law dealing with the taxation of American trusts on income derived from sources within the United States or to adopt the taxpayer's economic burden theory.

It is a cardinal rule of construction that—

the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Lynch v. Alworth-Stephens Co., 267 U. S. 364, 370, quoting with approval from the opinion of the Court of Appeals (294 Fed. 194). See also *DeGanay v. Lederer*, 250 U. S. 376.

It is well settled that in construing statutes exceptions are not favored and can never rest upon mere inference or implication alone. *Pacific Co. v. Johnson*, 285 U. S. 480; *Heiner v. Colonial Trust Co.*, 275 U. S. 232; *United States v. Stewart*, 311 U. S. 60.

To adopt taxpayer's theory would be tantamount to holding that there was a repeal of Sections 161 and 162 by implication, a theory which is not favored either in construing treaties or statutes except in cases of posi-

tive irreconcilable repugnancy between the earlier and later enactments. *Graham & Foster v. Goodcell*, 282 U. S. 409; *United States v. Barnes*, 222 U. S. 513.

Taxpayer admits (Br. 22) that at least 17 of the 24 articles of the treaty are cast in language designed to secure reciprocity, that is exemption from British tax by American subjects, in consideration of a like exemption of the United States tax by British subjects.

There are no articles in the treaty dealing with a pure case of American or British tax action as to their own subjects or exemptions where the taxes only indirectly affect the British subjects where, as here, they may feel the impact of the tax, such as beneficiaries of a taxable trust or estate or stockholder of a taxable corporation. It is true that the United Kingdom imposes no capital gains tax and the United States has by Article XIV extended exemption to British subjects by exempting them from a capital gains tax. Also as pointed out by taxpayer if the capital gains had been distributable currently to the beneficiaries they would be free from the tax because in such case they would be required under Section 162 (b), Internal Revenue Code of 1939, to include the amounts distributed to them in income. But as we have shown, where, as here, the sums are added to corpus, there is no tax on the beneficiaries either in 1946 or even in such years as the corpus is finally distributed on termination of the trust.⁹

⁹ The construction that we contend for here has long been accepted in principle in the construction by the Treasury Department of treatment of trusts for income tax purposes. In an early ruling A. R. N. 37, 2 Cum. Bull. 172 (1920) in construing Section 219 of the Revenue Act of 1918, it was ruled that a trust or estate was a separate taxable entity and that if it was administered in the

In its brief (pp. 37-42) taxpayer argues that the beneficiaries here owned equitable interests in the trust property and that in some cases the revenue laws reach and tax the equitable owners of property on the property income. It is sufficient answer to this contention we believe to say that the revenue laws here clearly tax the trustee and not the beneficiaries on the trust income unless such income is currently distributable to the beneficiaries under Section 162 (b), Internal Revenue Code of 1939, and the statute itself clears up any question as to who bear the imposition of the tax.

Taxpayer in its brief (pp. 44-48) relies as it did below on the case of *Lewenhaupt v. Commissioner*, 20 T. C. 151, affirmed *per curiam* 221 F. 2d 227 (C. A. 9th). The District Court considered this authority and regarded it as being readily distinguishable from the case at bar. In that case taxpayer a Swedish Count, a resident and citizen of Sweden, claimed exemption from United States tax on capital gains on sale of real estate in the United States under Article IX of the Convention between Sweden and the United States.

The Commissioner contended that Article IIX when read with Article V of the Convention should be construed as exempting only capital gains from securities and did not apply to real estate. The decision of the Tax Court as affirmed by this Court was in favor of the Commissioner. In reaching the decision and in construing provisions that were claimed to be ambiguous, the Tax Court placed great weight upon the construc-

United States its net income was subject to tax even though its beneficiaries were alien nonresidents, who would not be taxable under American law as it was in effect that time and which exempted income by nonresidents from sources within the United States.

tion placed on the Convention provisions by the Treasury Regulations (citing *Koshland v. Helvering*, 228 U. S. 441).

Article V of the Convention there provided that gains from the sale of real estate were taxable only in the contracting state where the property was located, while Article IX provided that gains derived in one of the contracting states from the sale or exchange of "capital assets" by a resident of the other state should be exempt. The Commissioner relied on Article V and the taxpayer relied on Article IX. The Tax Court resolved an apparent literal inconsistency principally by resort to the Regulations which supported the Commissioner's construction in the case. It also relied on the fact that under Article XIV of the Swedish Convention there was a broadly worded savings clause providing that notwithstanding other provisions of the Convention either the United States or Sweden might include in the basis of taxation all items of income taxable under laws of that particular country in which the taxpayers were residents.

Taxpayer here argues that the omission of a similarly broadly worded savings clause from the Convention here involved is significant and indicates an intent to impliedly repeal Sections 161 and 162.

Taxpayer in its brief (p. 44) states that if a similar savings clause had been inserted in the Convention here involved our argument against repeal by implication would perhaps have merit but points out that a similar specific savings clause has appeared in other Conventions all of which it argues indicates an intent that the United States would not retain its taxing rights under Sections 161 and 162.

It is clear that the conventions between various countries and the United States were all arrived at through negotiations on a give or take basis and savings provisions in one or more is no indication of the intent as to others.

In the Report of Senate Sub-Committee dated June 30, 1945, appearing in Senate Executive Report No. 4, 79th Cong., 2d Sess., pp. 11-12, it is stated:

The conditions encountered in negotiations with foreign countries are found to vary widely as between the respective countries and thus any specific provisions found in one convention may not be found, from the United States standpoint, to be acceptable in a convention with another country. A concession made to a particular country by the United States in a tax convention with such country may not be made in the case of another country in the absence of compensating concessions by such country.

See also Report on Hearing before a Sub-Committee of the Senate Committee on Foreign Relations, 79th Cong., 1st Sess., on Executive D (Convention with Great Britain and Northern Ireland) showing the following:

1. In a memorandum prepared for the Senate Committee on Foreign Relations it is stated (p. 29):

Examination of every income-tax convention to which the United States is a party will show that it is composed of a series of compromises so far as existing laws and practices of the parties to the Convention are concerned, and the pending Convention with Britain is no exception.

2. A statement of Deputy Commissioner Eldon P. King before the Senate Foreign Relations Committee shows (p. 56):

There were many compromises in this Convention. * * * Since the provisions of tax conventions represent mutual concessions by both contracting Governments, the present memorandum is directed to that subject.

3. Collin F. Stam, Chief of Staff, Joint Committee on Internal Revenue Taxation, stated (p. 69):

Any Convention of this sort is pretty well frozen when it comes to us. It is sort of give-and-take arrangement between the two countries.

Though the so-called saving clause appearing in the Swedish Convention does not appear in *haec verba* in the United Kingdom Convention, its provisions are as shown above in substance incorporated in Article II(3). See also Article III(1) and (2) (Br. App. 5a-6a)¹⁰ which provides that United Kingdom Enterprises are not subject to United States tax nor United States enterprises subject to British tax unless they are engaged in trade or business in the taxing countries. The definition of "enterprises" given in Article II(1) (i) and (j) (Br. App. 4a) coincides with residences in that particular country.

Taxpayer also argues that in the *Lewenhaupt* case, *supra*, it is significant that the Regulations were there specifically authorized by the terms of the Convention while here there is no express authorization for the

¹⁰ "Br. App." references are to the separate bound appendix to taxpayer's brief.

prescribing of the Regulations. As we have shown, the right to prescribe Regulations governing treaties is clearly recognized even in the absence of specific terms of the Convention. See *Factor v. Laubenheimer*, 290 U.S. 276. It has always been recognized by the courts that the Executive Branch may interpret treaties and, as we have shown, their construction is entitled to great weight. Furthermore, as we have shown, construction by Regulations of exemption provisions of the revenue laws given by treaties are specifically authorized by Section 62, Internal Revenue Code of 1939, which authorizes Regulations construing all taxing provisions of Chapter 1 of the Internal Revenue Code of 1939.

Taxpayer has cited no controlling authority for the position taken. Its entire argument consists of an attempt to effect repeal of an American taxing act by implication through a strained construction of provisions of a treaty where the plain language of the treaty and the administrative construction are against the construction contended for and where there is nothing in the legislative history and no legal authorities to warrant the construction claimed.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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FEBRUARY, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusion from Gross Income*.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(77) *Income exempt under treaty*.—Income of any kind, to the extent required by any treaty obligation of the United States;

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

* * * * *

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful

rules and regulations for the enforcement of this chapter.

(26 U. S. C. 1952 ed., Sec. 62.)

* * * * *

SEC. 117 [As amended by Section 150 (a) (1) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. CAPITAL GAINS AND LOSSES.

(a) *Definitions*—As used in this chapter—

* * * * *

(4) *Long-term capital gain*.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * * *

(26 U. S. C. 1952 ed., Sec. 117.)

* * * * *

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax*.—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of any infant

which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries, or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

(26 U. S. C. 1952 ed., Sec. 161.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitations, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or, educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) [As amended by Sec. 111 (b), Revenue Act of 1942, *supra*]. There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

(26 U. S. C. 1952 ed., Sec. 162.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person*.—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

* * * * *

(14) *Taxpayer*.—The term "taxpayer" means any person subject to a tax imposed by this title.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3797.)

3 Deering's California General Laws, Act 8696:

Sec. 3. *What deemed income and principal: Disposition of net income and principal.* * * *

(2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, of property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this act. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal, except in the case of property referred to and defined by Section 11A, in which case the provisions of Section 11A shall govern.

Convention between the United States of America and the Kingdom respecting double taxation and taxes on income and protocol, 60 Stat. (Part 2) 1377.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA A PROCLAMATION

* * * * *

ARTICLE I

(1) The taxes which are the subject of the present Convention are:

(a) In the United States of America:

The federal income taxes, including surtaxes and excess profits taxes (hereinafter referred to as United States tax).

(b) In the United Kingdom of Great Britain and Northern Ireland:

The income tax (including surtax), the excess profits tax and the national defense contribution (hereinafter referred to as the United Kingdom tax).

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the government of any territory to which the present Convention is extended under Article XXII.

ARTICLE II

(1) In the present Convention, unless the context otherwise requires:

* * * * *

(g) The term "resident of the United Kingdom" means any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom.

(h) The term "resident of the United States" means any individual who is resident in the United States for the purposes of United States tax and not resident in the United Kingdom for the purposes of United Kingdom tax, and any United States Corporation and any partnership created or organized in or under the laws of the United States, being a corporation or partnership which

is not resident in the United Kingdom for the purposes of United Kingdom tax.

* * * * *

(3) In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

ARTICLE XIV

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.

T. D. 5569, 1947-2 Cum. Bull. 100:

* * * * *

Pursuant to section 62 of the Internal Revenue Code, and other provisions of the internal revenue laws, the following regulations, which are designated as sections 7.514 to 7.532, are hereby prescribed and all regulations inconsistent herewith are modified accordingly:

SEC. 7.514. SCOPE OF THE CONVENTION.—The primary purposes of the convention to be accomplished on a reciprocal basis, are to avoid double taxation upon major items of income derived from sources in one country by persons resident in the other country, and to exchange fiscal information complementary to other provisions of the convention, including those relating to avoidance of double taxation.

The specific classes of income from sources within the United States exempt under the convention from

United States tax for taxable years beginning on or after January 1, 1945, are:

(a) Industrial and commercial profits of a United Kingdom enterprise having no permanent establishment in the United States (Article III);

(b) Income derived by a nonresident alien who is a resident of the United Kingdom, or by a United Kingdom corporation, from the operation of ships documented or aircraft registered, under the laws of the United Kingdom (Article V);

(c) Interest and royalties (including film rentals) derived by a nonresident alien who is a resident of the United Kingdom or by a foreign corporation managed and controlled in the United Kingdom if such alien or corporation (1) is subject to United Kingdom tax upon such interest or royalties, and (2) has no permanent establishment in the United States (but such exemption does not apply to interest paid to such foreign corporation controlling the corporation paying such interest) Articles VII and VIII);

(d) Compensation and pensions paid by the United Kingdom to individuals (other than a citizen of the United States who is not also a British subject) for services rendered to the United Kingdom in the discharge of its governmental functions (Article X);

(e) Compensation for personal services derived by a nonresident alien who is a resident of the United Kingdom if (1) such alien is present in the United States for a period or periods not exceeding 183 days during the taxable year, and (2) such services are performed for, or on behalf of, a person resident in the United Kingdom (Article XI);

(f) Pensions (other than pensions paid by the Government of the United States) and life annuities derived by nonresident alien individuals residing in the United Kingdom (Article XII);

(g) Gains from the sale or exchange of capital assets by a nonresident alien who is a resident of the United Kingdom or by a foreign corporation managed and controlled in the United Kingdom, if such alien or corporation has no permanent establishment in the United States (Article XIV);

(h) Dividends and interest paid on or after January 1, 1945, by a corporation organized under the laws of the United Kingdom to a nonresident alien or foreign corporation (Article XV);

(i) Remuneration derived from teaching in the United States for a period of not more than two years by a professor or teacher who is from the territory of the United Kingdom, but who is temporarily present in the United States (Article XVIII);

(j) Remittances from sources within the United Kingdom received in the United States by a nonresident individual who is from the territory of the United Kingdom but who is temporarily present in the United States for the purpose of education, or training, such remittances being for the purpose of his maintenance, education, or training (Article XIX).

* * * * *

SEC. 7.519. EXEMPTION FROM, OR REDUCTION IN RATE OF, UNITED STATES TAX IN THE CASE OF DIVIDENDS, INTEREST, ROYALTIES, NATURAL RESOURCE ROYALTIES, AND REAL PROPERTY RENTALS.

* * * * *

(c) *Beneficiaries of an estate or trust.*—A nonresident alien who is a resident of the United Kingdom and who is a beneficiary of a domestic estate or trust shall be entitled to the exemption, or reduction in the rate of tax, as the case may be, provided in Article VI, VII, VIII, IX, and XIV of the convention with respect

to dividends, interest, royalties, natural resource royalties, rentals from real property, and capital gains to the extent such item or items are included in his distributive share of income of such estate or trust if he is taxable in the United Kingdom on such income and is not engaged in trade or business in the United States through a permanent establishment. In such case such beneficiary must, in order to be entitled to the exemption or reduction in the rate of tax, execute Form 1001-UK or Form 1001A-UK (modified to show dividends where applicable) and file such form with the fiduciary of such estate or trust in the United States.

In any case in which dividends, interest, royalties, rents, or the like are derived from United States sources by a United Kingdom estate or trust any beneficiary of such estate or trust who is not a resident of the United Kingdom is not entitled to any exemption under the convention with respect to such income included in his distributive share of the income of the estate or trust.

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SEC. 7.523. CAPITAL GAINS.—Under Article XIV of the convention, when read in association with Article II(2) of the convention, gains from the sale or exchange of capital assets by a nonresident alien individual who is a resident of the United Kingdom or by a foreign corporation managed and controlled in the United Kingdom are, for taxable years beginning on or after January 1, 1945, exempt from Federal income tax unless such alien or corporation has a permanent establishment in the United States. As to what constitutes capital assets, see section 117 Internal Revenue Code. As to what constitutes a permanent establishment see section 7.515 of these regulations. If A, a non resident alien individual who is a resident of the United Kingdom, performs personal services within the

United States during the calendar year 1946 for a domestic employer, he is engaged in trade or business within the United States in such taxable year. (Section 211 (b), Internal Revenue Code.) He carries on in that year no other business activity within the United States other than certain securities transactions upon a domestic stock exchange and maintained no office or other fixed place of business within the United States at any time during such year. A is not subject to Federal income tax upon his capital gains, if any, realized from his securities transactions. Likewise, a foreign corporation managed and controlled in the United Kingdom, selling its products manufactured in the United Kingdom through a resident commission agent or broker in the United States, and having certain securities transactions within the United States as its only business activity therein, is exempt from United States tax upon those capital gains, if any, arising from the securities transactions within the United States.

No. 15339

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN TRUST COMPANY, a Corporation,
Plaintiff-Appellant,
vs.

JAMES G. SMYTH, Collector of Internal Revenue,
and UNITED STATES OF AMERICA,
Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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AMERICAN TRUST COMPANY, a Corporation,
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Defendants-Appellees.

APPELLANT'S REPLY BRIEF

The defendants' brief completely misconceives the fundamental issue in this case and fails to answer our major points.

At the outset (p. 16) "the crucial issue", say the defendants, centers on the question whether the tax here in issue "is being imposed" on the remaindermen, or "is on the trust", adding that, as the exemption deals "exclusively" with taxes imposed by the United States, it would seem "fairly clear" that the treaty intended that the question be answered "only in relationship to the laws of the United States",¹ meaning, as the defendants later make abundantly clear, that the scheme of our domestic statutes taxing trusts (as exemplified in Sections 161 and 162 of our Code) is still controlling, in spite of the exemption accorded in the United Kingdom treaty.

We do not agree that "the crucial issue" is as the defendants frame it. The "crucial issue", we submit, is

¹ We do not agree that the statement is "fortified" by Article II (3) of the convention, for the reasons set forth on page 6, *infra*.

the extent of the exemption accorded by the treaty, without regard to the question of upon whom the tax, but for the exemption, is "imposed" under our domestic statutes. The exemption applies to United States taxes but is not one "dealing exclusively" with United States taxes. It must be considered in the light of the United Kingdom tax structure, for Article XIV unquestionably is aimed at reciprocity and equality of treatment, as the defendants admit.

The extent of the exemption under the treaty must be resolved, we submit, on the basis of the intent of the contracting parties as disclosed by the treaty as a whole and by the language of Article XIV in particular. Without some supporting factual proof in the record, it cannot be presumed, as the defendants are intent upon doing, that our domestic rule taxing trusts was adopted as controlling in framing Article XIV, or in determining the extent of the exemption intended to be accorded under the treaty. If any presumption is to be indulged in it is that the British negotiators, intent on accomplishing full reciprocity for British nationals, were content to couch the exemption in Article XIV in broad and all-embracing language, while at the same time refusing to include the standard saving clause.

The familiarity of American judge and lawyer alike with our mechanics of taxing trusts should not, we submit, be allowed to influence the interpretation of an international treaty, which as finally drawn represents agreement on the part of the negotiators representing the foreign nation (unversed in our domestic law) as well as our own negotiators, unless the treaty indicates on its face that our domestic rules intentionally were adopted as part of the treaty, as, for example, the incorporation of the standard saving clause.

The major argument of the defendants, which runs throughout their brief, is that *under our domestic statutes*

a trust is a separate entity (pp. 18, 19, 20), that the trustee is the "taxpayer" upon whom the tax is "imposed" (pp. 16, 20, 21, 22, 27), and that to extend the treaty exemption to trust gains retained for future distribution would result in the "repeal" of Sections 161 and 162 of our Revenue Code (pp. 31, 32, 35, 38), a theory which is not to be favored (p. 32).

The argument is unconvincing for a number of vital reasons. We are here engaged in interpreting a treaty between two sovereign nations, more particularly an exemption provision exempting from United States tax the capital gains of nationals of the United Kingdom, implemented without restriction or limitation by Section 22(b)(7) of our Code. It is true that under our domestic statutes a trust for tax purposes is treated as a separate entity. But Article XIV does not deal with individual taxpayers of the United States, or with our domestic scheme of taxation. Its sole purpose is to grant an equalizing exemption to residents of another nation, in order to reciprocate such nation's tax treatment of capital gains. Moreover, as we pointed out in our Opening Brief, page 31, the treaty, while expressly recognizing a corporation as a separate entity, nowhere accords a trust either the status of an "entity" or of a "juridical person". The theory of the separate entity of trusts is wholly a doctrine of our *domestic statutes*, with no counterpart in the treaty.

Secondly, and again under our domestic statutes, the defendants say that the trustee is the "taxpayer" and the tax is "imposed" on the trustee and not upon the remaindermen, adding (p. 19) that the trustee does not act "as a mere agent in the collection of the income but receives such income as a taxable entity in its own right and not as an agent or conduit for the beneficiaries". This of course is technically true *under our domestic statutes*. But from the broader standpoint of an exemption in an international treaty, the argument does not bear analysis. In dealing

with trust property a trustee acts as a fiduciary only. He collects the income, whether current income or capital gains. But the income is not his; it is the income of the beneficiaries by any test of real ownership. He is strictly accountable to the beneficiaries in accordance with the trust instrument. This accountability extends to the life beneficiaries in respect of currently distributable income, and to the remaindermen in respect of retained capital gains. Whether distributable or retained, the gains are not the trustee's gains but the property of the beneficiaries. In a broad and non-technical sense, the trustee is in reality acting for and as the agent of the beneficiaries, whether the income which he collects is distributed or retained. The beneficiaries, and not the trustee, are the real parties in interest and the real owners of the income. A tax "imposed" upon the trustee is in substance and reality a tax imposed upon the beneficiaries, who assuredly pay it out of property belonging to them.

Take the case of a United States trust where one of two remaindermen is a charitable organization. The trustee is the "taxpayer" and must file a return and pay any tax which may be due on account of retained capital gains held for the non-charitable remainderman. But the capital gains retained and permanently set aside for the charity are exempt in the hands of the trustee even though the trustee is not exempt; it is the exempt status of the remainderman which relieves the trustee of the tax. In view of the evident intent in the treaty to accomplish reciprocity, it is not unreasonable to apply the same principle in exempting capital gains under Article XIV.

Finally, to extend the treaty exemption to capital gains retained for future distribution does not, as the defendants assert, result in a "repeal" of Sections 161 and 162. In any case where capital gains are involved which, except for an exemption, would be taxable under our domestic statutes, the exemption necessarily overrides our domestic statutes

to the extent that the non-resident aliens of the particular nation involved (here residents of the United Kingdom) are relieved from our capital gains taxes. But the sections of our statutes taxing capital gains stand untouched, subject to the limited relief accorded by the exemption.

With a view of showing the inherent fallacy of the defendants' entire major argument, let us suppose as an example that the language of Article XIV was express in exempting from United States tax capital gains of a trust held for future distribution. On such an assumption, assuredly the fact that under our domestic statutes a trust is considered a separate entity and the tax on retained gains is "imposed" on the trustee would not be ground for denying the exemption, and assuredly the exemption would not constitute a "repeal" of Sections 161 and 162.

The language of Article XIV, while not so specific, properly interpreted does, we submit, encompass within its intent and scope retained capital gains. In any event, the foregoing example serves to show that the taxability or non-taxability of the gains here involved should be determined within the four corners of the treaty, without regard to the scheme of our domestic statutes taxing trusts, unless it can be shown that the negotiators of the treaty intended to adopt and *make part of the treaty* the United States theory of taxing trusts.

On the face of the treaty there is nothing to indicate directly or by implication that such was the intention of the negotiators. There is nothing in the Committee Reports indicating any such intention. No minutes of the negotiators, if any such exist, were introduced in evidence. The record is devoid of any factual proof on the point. On the other hand, the language of the treaty as a whole and the all-embracing language of Article XIV in particular negatives the existence of any such intention. Finally, and perhaps conclusively, the absence of the stand-

ard saving clause (appearing in fifteen of our nineteen international income tax conventions) seems definitely to negative such an intention.

In the absence of any saving clause the defendants undertake to seek comfort in Article II(3) (pp. 16, 24, 27, 37) and in Article III(1) and (2). Article II(3) is quoted in full on page 16 of the defendants' brief. The article, as a reading of it indicates, is directed at any "*term*" of the convention not otherwise defined. The only "*terms*" in Article XIV with which we are concerned are "A resident of the United Kingdom", "exempt", "sale or exchange" and "capital assets". The term "trust" does not appear in the convention. There is no question about the meaning of any of the terms appearing in Article XIV except possibly the term "exempt" (which we have already discussed in our Opening Brief, page 19). Certainly, Article II(3) does not, as the defendants say on page 24, amount to "an expression of policy" that the convention is to be construed in accordance with the laws of the country imposing a tax.

Moreover, Article II(3) is qualified by the clause "unless the context otherwise requires". Here, we submit, the context in which the word "exempt" appears negatives the meaning of the word as incorporating our domestic rules of taxing trusts. As we have shown, the theory and intent of the treaty from beginning to end was to accomplish reciprocity and equality of tax treatment. Article XIV was no exception. If reciprocity is to be accorded in respect to capital gains, the word "exempt" must embrace in its meaning the type of exemption which it is designed to reciprocate, namely, the same relief from tax in the United States as is accorded capital gains in the United Kingdom.

Article III(1) and (2) equally falls short of sustaining the defendants' argument. It has to do with income from a so-called "enterprise", and contemplates a United States

tax or a United Kingdom tax on an enterprise having "a permanent establishment" situated in the taxing state, and accomplishes mutual reciprocity.

Indeed, we have searched the treaty with meticulous care and can find nothing in it, either in express statement or by implication, justifying the conclusion that the exemption in Article XIV is in any way limited by our domestic scheme of taxing the income of trusts.

The defendants argue (p. 20) that where income is accumulated by a trust the taxes are paid by the trustee at a rate dependent on the net income of the trust "having no relationship to the current income of the putative beneficiaries", and conclude that no tax is "imposed" on "any of the beneficiaries" with respect to such accumulated income. Virtually the same situation exists in the case of the distributable income of a trust payable to a resident of the United Kingdom under the treaty or to any other nonresident alien outside of a treaty. Such income is taxed at a flat withholding rate having no relationship whatsoever to the current income of the distributee. In either case, whether the tax is paid by a trustee or by a withholding agent, it is impracticable to be concerned with the individual income tax brackets of the remaindermen or the nonresident aliens. But the tax is nonetheless a tax upon the income of the remainderman or of the nonresident alien. Where the nonresident alien is made exempt by treaty, such income must necessarily be exempt in the hands of the withholding agent or the trustee, for to do otherwise "would have the effect of taxing income which is specifically exempted by treaty". See I. T. 4019, 1950 Cum. Bull. 58, quoted on page 37 of our Opening Brief.

The defendants (p. 22) assert that "an exemption from a United States tax can scarcely have been created in favor of persons who are not subject to a tax and on whom no tax has been imposed", and, below on the same page, the liability of a trustee for tax "is not determinable by the status

of the beneficiaries * * * or by their equitable title in trust property'', citing *Lloyd v. Delaney*. In dealing with an international convention according a broad and reciprocal exemption in respect to capital gains, there is no inherent reason why the exemption should not be made to depend on the status of the remaindermen of a trust when, aside from the exemption, such remaindermen definitely stand the tax, even though in the first instance the tax is "imposed" on the trustee; on the contrary, in all fairness and justice there is every reason why the exemption should be determined by the status of the remaindermen when such remaindermen are the equitable owners of the capital gains and fully qualify for exemption. Even under our domestic statutes, which expressly make the trust a separate entity and designate the trustee as "the taxpayer", capital gains of a trust permanently set aside for a charitable remainderman are exempt without regard to the exempt status of the trustee. See our Opening Brief, page 36. There is even more reason for applying the same principle in the case of an international treaty which is aimed at equalizing the treatment of capital gains of residents of the two contracting parties.

The defendants (p. 24) say that treaties will not be regarded as destroying earlier statutes unless the purpose to abrogate these statutes is clearly expressed and unless the two are clearly incompatible. The statement of the rule is not complete, but in any event the rule is here immaterial, for Section 22(b)(7) eliminates all conflict between the treaty and our statutory law.

The *Delaney* case arose under Section 421 of our 1939 Code, and so the Court was inclined to follow our domestic rules of taxing trusts. The Court laid its decision upon the difference between "individual income taxes" and "fiduciary income taxes". No such distinction is made in the treaty, either expressly or by implication, so the case has no bearing upon the interpretation of Article XIV, where the principles of the *Tait* case ruling come directly into

play. (See our Opening Brief, page 36, and more particularly, I. T. 4019, 1950 Cum. Bull. 58, quoted on page 37, which represents the considered position of the Commissioner of Internal Revenue.)

The defendants (p. 27) suggest that the exemption for which we contend turns "on the probable future status of persons who might ultimately be economically disadvantaged", and, on the page following, states that such a rule raises "almost impossible difficulties". These statements indicate a complete lack of understanding of our position. The capital gains here involved were realized in 1946, and the exemption accorded by the treaty, whether it be limited to gains on the sale of individually owned property or extended to distributable and retained gains, necessarily must depend upon the state of affairs in the year of sale. See our Opening Brief, pages 55-56, and the authorities cited. Thus under Section 162 (a) of our Code the income of a trust, including capital gains paid or permanently set aside for a charity, is exempt notwithstanding the fact that in the years subsequent to the payment or setting aside such charity may lose its exempt status for a number of reasons, such as engaging in "prohibited transactions". Again, in the case of an individual sale or a sale by a trustee where the gains are currently distributable, the exemption applies, providing only that in the year of sale the requirements for exemption are fulfilled.

In the case of retained gains it is not a question of who in point of fact ultimately will receive such gains or in what year. The only question is whether, in the year of sale, the remaindermen, unquestionably the equitable owners of the capital gains, qualify as residents of the United Kingdom. Capital gains retained for future distribution, although credited to corpus as a matter of trust accounting and though ultimately distributed as part of the corpus, nevertheless represent earnings or profits on the corpus in the year when such earnings or profits occur. The exemp-

tion attaches, and was intended to attach, depending upon the status of the equitable owners of the capital gains in the year when the capital gains occurred. The exempt status of the remaindermen here involved will in all likelihood continue indefinitely.

The defendants (p. 29) also suggest what would be the situation where some of the beneficiaries are residents of the United Kingdom during the year of sale and others are not. This situation is not of course presented in this case, but if such a situation should arise, it would be both appropriate and practically feasible to relieve the qualifying beneficiaries of that portion of the capital gains tax attributable to their interest in the trust. Such a rule would not create any difficulty in application. A similar problem arises under the so-called attribution of stock ownership rules applicable to trusts. Section 318(a)(2)(B) of the 1954 Revenue Code provides that "Stock owned, directly or indirectly, by or for a trust shall be considered as being owned by its beneficiaries in proportion to the actuarial interest of such beneficiaries in such trust." See also Section 503(a)(1) of the 1939 Code. If such a rule is practical in the case of the attribution of stock ownership, a similar rule should present no difficulty in the administration of Article XIV. But however this may be, where all the beneficiaries qualify, assuredly the tax on capital gains is within the exemption.

The defendants argue (p. 27) that if it had been intended the exemption accorded by Article XIV should cover retained capital gains, "it would be expected" that there would have been inserted an explicit provision so indicating, and on the following page, after characterizing our discussions of the other provisions of the treaty as "misplaced", suggest that as "detailed provisions" were used to deal with other variations from our domestic scheme of taxation, the absence of such detailed provisions in Article XIV indicates the lack of intent to depart from our domestic theory of taxing trusts.

The presence of more or less detailed provisions in certain of the articles of the treaty which override our domestic law does not mean that the absence of similar detailed provisions in a particular article is any indication of an intention to preserve our domestic law. In the construction of a treaty as in the construction of a statute, it is a matter of interpreting the language actually used in the particular article under consideration. General language may be as explicit as detailed language. The detail or lack of detail in a particular article is not ground for any such inference as the defendants suggest, when the language used is amply sufficient to include the exemption claimed. If there was any intent of the negotiators to preserve our domestic law in the case of trusts and impose a tax upon the trustee even though the remaindermen fully meet the requirements of exemption, "it would be expected" that the standard saving clause would have been incorporated into the treaty.

There are two types of instances found in the treaty where the treaty departs from our domestic scheme of taxation. The first type involves a treaty exemption of an item of income which otherwise would be taxable under our domestic law. In this respect Article XIV is clearly and sufficiently explicit, for in terms it exempts "capital gains". The second type deals with the incidence of the tax, that is, who formally is the "taxpayer" relieved from the tax. Article XIV is not explicit in this respect, nor need it be, for nowhere in the treaty is a trust made a separate taxable entity. By way of comparison, in some of the articles involving corporations (such as Article XIII) detailed language was used, but here it was necessary because the treaty itself expressly treats a "corporation" as a separate taxable entity, so that any departure from this rule would have to be made in the form of an express provision in the treaty. On the other hand, as stated above, the treaty does not recognize or define a trust as

an entity, so that in the case of Article XIV no reason existed for a detailed provision in the treaty indicating that a trust was not a separate entity, for the purpose of applying the exemption.

In the middle paragraph on page 30 the defendants say that in the case of trusts absolute reciprocity between the residents of the two countries is almost impossible to achieve, due to the possibility of a higher rate of British tax on ordinary income. This is purely a hypothetical argument without support in the record or in the respective statutes. It is beside the point, for Article XIV with which we are here involved deals with capital gains and the reciprocity of treatment of such gains. Other types of income, such as dividends and interest, are dealt with in other provisions of the treaty.

We do not agree, as the defendants say at the bottom of page 31, that "much the same rules are followed in construing treaties that are used in construing statutes". As we pointed out in our Opening Brief, pages 52 *et seq.*, the search for the intent is of primary importance whether a statute or a treaty is under consideration. But there the similarities of the rules for construing a statute and a treaty depart sharply. It is firmly fixed by our Supreme Court decisions that a treaty "shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them", and, further, that "where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred" (see quotation from the *Geofroy* case on pages 53-4 of our Opening Brief). No such rules apply in construing a statute. Here is the major difference between the rules of construction.

The defendants make only one reference (the top of page 34) to our argument predicated upon the equitable ownership of the United Kingdom remaindermen, but do

not at any point undertake to answer the argument. (See our Opening Brief, page 37 *et seq.*) Certainly, in interpreting an international treaty a distinction between legal and beneficial ownership is unwarranted, for under modern conditions the equitable ownership of a trust corpus is of greater import than legal ownership. The capital gains here involved were income in equitable ownership of the remaindermen and, assuredly, are within the broad language of Article XIV.

In another material respect the defendants do not even refer to, and so do they attempt to answer, a cogent argument, indicating how irrational it is to make a distinction between capital gains which are currently distributable and capital gains which are retained for future distribution. As we say on page 44 of our Opening Brief, where a gain arises on the sale of property held in trust, in the absence of any controlling language in the trust instrument the gain is distributable or is retained, depending upon the law of the state under which the trust is created. These laws vary between states. In interpreting an international treaty assuredly it should be applied uniformly throughout the United States. To make the exemption in Article XIV depend upon the law under which the trust is created would make the interpretation of an international treaty dependent upon local state law. As we said on page 44 of our Opening Brief, "Such a result is quite unthinkable".

In a number of instances throughout the defendants' brief (pp. 15, 27, 29) it is said that the interests of the United Kingdom remaindermen of the trust were "contingent". On the contrary, it is clear that throughout 1946, the year of sale, the interests of the United Kingdom remaindermen were vested, subject only to a possibility of a future shifting of interest within the closed class. (See our Opening Brief, page 56 *et seq.*) Evidently the defendants are not convinced that the interest was contingent, for in the footnote on page 28 they say, "Even though the

interest of the beneficiaries is 'vested' either for the purpose of the rule against perpetuities or for any other purpose'', etc. Unquestionably, the interests were vested throughout 1946.

As we pointed out in our Opening Brief, page 44, footnote 12, the United States has negotiated nineteen income tax conventions with foreign nations, all of which contain the standard saving clause, save for the conventions with the United Kingdom, New Zealand, Ireland and Australia. In their discussion of the *Lewenhaupt* case and the Swedish treaty (pp. 36-37) the defendants, in an effort to minimize the absence of the standard saving clause in the United Kingdom convention, say that "the conventions between various countries and the United States were all arrived at through negotiations on a give or take basis and saving provisions in one or more is no indication of the intent as to others'', citing various reports and statements which suggest that income tax conventions are composed of a series of "compromises" and "mutual concessions". But the argument cuts both ways. In the case of the United Kingdom convention, it was obviously to the advantage of the United States to have the standard saving clause inserted, if for no other purpose than to support the tax in this very case. On the contrary, the British, viewed from their standpoint, would lose, not gain, by incorporating the standard saving clause, even though it were mutually reciprocal. Yet none was inserted, although readily at hand. Unquestionably, the "give or take" in the British treaty was such that in respect of the standard saving clause the United States was forced to recede. Yet now before this Court the defendants are endeavoring to write into the British treaty a saving clause which does not appear. If any presumption is to be indulged in as a result of the "give or take" and the "compromises" in the British convention, it is that as a compromise the United States negotiators were forced to omit the standard saving clause.

The defendants seek comfort in the Treasury regulations (p. 24), particularly in their discussion of the *Lewenhaupt* case and the Swedish treaty (pp. 35, 37-8). We desire to add only one or two brief comments to what we say in our Opening Brief, page 48 *et seq.* The defendants concede that the Treasury regulations here involved are not controlling but contend that they should be given "great weight" (p. 26), saying (p. 35) that in deciding the *Lewenhaupt* case the Tax Court resolved the apparent inconsistency "principally by resort to the Regulations". This is not strictly accurate. The decision was placed mainly on two points, namely, the presence of the standard saving clause in the Swedish treaty and the inapplicability of Article IX since the taxpayer maintained "a permanent establishment" in the United States. Thus the Tax Court concluded independently of the regulations that the taxpayer was not entitled to exemption, which no doubt largely accounts for the statement that the regulations were entitled to great weight.

In the case of the United Kingdom treaty, the defendants concede as they must that the treaty is devoid of any authority sanctioning the issuance of administrative regulations, but argue that Section 62 of our domestic code, which embraces Section 22(b)(7), sanctions the treaty regulations. The argument is not persuasive. The absence of any sanction in the treaty itself cannot be ignored by this indirect approach. Section 22(b)(7) is a flat adoption of the treaty exemption, unconditionally and without limitation. Certainly, as we said on page 49 of our Opening Brief, in the absence of any express sanction in the treaty, the Treasury regulation "is to be viewed with skepticism insofar as it falls short of giving full recognition to Article XIV", when there is involved, as here, the rights of a national of the United Kingdom.

In Summary of Our Position

At the outset of this Reply Brief, we stated that the "crucial issue" is the extent of the exemption accorded under the United Kingdom treaty, an issue which must be resolved within the four corners of the treaty. In conclusion, let us review briefly the considerations which support us in our contention that the capital gains here involved are within the treaty exemption.

On the face of Article XIV the language is simple and all-embracing, "A resident of the United Kingdom * * * shall be exempt from United States tax" on capital gains. The language is amply broad enough to include capital gains of a trust retained for future distribution. There is no limitation or condition on this simple language. The ordinary reader can draw only one conclusion, namely, that a United Kingdom resident shall be free from any capital gains tax which directly or indirectly he would otherwise be forced to bear.

The all-embracing intent expressed in this simple language is fortified by two major and controlling considerations. Those who here claim the exemption were the equitable owners of the capital gains in the year when the gains occurred, and unquestionably stand the tax unless exempted. In construing an international convention directed at equalizing the tax burden falling upon the nationals of the two contracting parties, any distinction between legal ownership and equitable ownership is unwarranted, and substance, not form, should control.

Again, unless the full import of the simple language employed is followed, only partial, not full, reciprocity will be accomplished. The main objective, apparent throughout the treaty, was to put the nationals of the two contracting parties upon the same basis with respect to taxing capital gains. This the defendants at no point deny. They say only (p. 25) that the convention seeks to avoid "double taxa-

tion", with the qualifying statement "in certain cases". The elimination of double taxation is achieved in many instances, but in at least three instances, namely, Articles XIV, XV and XVI, the item is relieved from *all* taxation by *either* of the contracting nations. These instances show the extent to which the two nations went in accomplishing complete reciprocity.

To make a distinction between the exemption of distributable gains and gains retained for future distribution is irrational and unwarranted. In both cases the gains arise from the sale of property held in trust. In both cases the tax falls in truth and substance upon residents of the United Kingdom. As a result of such a distinction, in many cases the exemption would be made to depend upon the varying laws of the states determining whether the gains are currently distributable or are to be retained for future distribution. Finally, the distinction would withhold from residents of the United Kingdom the full measure of reciprocity which the treaty was intended to accomplish, thus placing at a serious disadvantage such residents when compared with the preferential treatment accorded residents of the United States.

The defendants say that we would ascribe to the language of Article XIV a strained and curious meaning. On the contrary, the meaning which we ascribe to such language is a simple, forthright meaning, a meaning which the language has in normal and ordinary use. Indeed it appears to us that it is the defendants who are endeavoring to torture this simple and all-embracing language through the curious and unwarranted device of attempting to limit the language by reading into Article XIV our domestic and technical concepts of taxing the income of trusts. These concepts are entirely irrelevant, for the reasons set forth above. Construing Article XIV within the four corners of the treaty and in accordance with the expressed intent, the capital gains here involved are made exempt from United States taxes.

Conclusion

It is respectfully submitted that the judgment of the Court below should be reversed with costs, and that it be ordered and adjudged that judgment should be entered in favor of the plaintiff in the sum of \$570,957.86, with interest thereon as provided by law, as prayed for in the complaint.

Respectfully submitted,

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Dated: San Francisco, March 18, 1957.

In the
United States
Court of Appeals
For the Ninth Circuit

WYMAN W. GRAEBER, *Appellant*,
v.
MERLE E. SCHNECKLOTH, Superintendent of Washington State Penitentiary, at Walla Walla, Washington, *Appellee*. } No. 15346

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN
DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

Brief of Appellee

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In the
United States
Court of Appeals
For the Ninth Circuit

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|--|-------------------|-------------|
| WYMAN W. GRAEBER, | <i>Appellant,</i> | } No. 15346 |
| v. | | |
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APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES
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Brief of Appellee

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APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES
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WASHINGTON, SOUTHERN
DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

Brief of Appellee

APPELLEE'S STATEMENT OF THE CASE

This individual was charged with robbery on January 4, 1954. (Tr. 10 and 12.) He was convicted by a jury and sentenced to forty years imprisonment on July 12, 1954. (Tr. 10 and 13.) He appealed and the Supreme Court of the State of

Washington rendered a decision in *State v. Graeber*, 46 Wn. (2d) 602 (Appendix). He appealed to the Washington Supreme Court for a writ of *habeas corpus*. It was denied. He made a number of allegations in his petition which were all concerned with the merits of the case and which were answered in the opinion rendered by the Washington State Supreme Court. His only new allegations are the following:

I.

The allegations and documents of the respondent's return and answer are false and evasive, and he was kept in jail for eighty days without being charged. (Tr. 17.)

II.

He was not represented at the *habeas corpus* proceeding in the Washington Supreme Court. (Tr. 4.)

APPELLEE'S STATEMENT OF QUESTIONS INVOLVED

I.

Assuming as true that he was held eighty days without being charged for a crime, was the Washington trial court divested of jurisdiction?

II.

Was his denial to be represented by counsel at his *habeas corpus* proceeding a violation of due process?

ARGUMENT

I.

The appellant's first issue is apparently directed to the question of whether or not he was given the constitutional right to a speedy trial. We can assume his allegations as being true merely for the purpose of argument. However, nothing appears in the record of any factual basis which would substantiate such an allegation. It must be further pointed out that it is being raised for the first time in this court. This issue, however, has been answered by the Washington Supreme Court as follows:

In *State ex rel. James v. Superior Court*, 32 Wn. (2d) 451, 202 P. (2d) 250, 455, the court said:

"The constitutional guaranty of a speedy trial is a privilege granted to the accused. If he demands a speedy trial, it must be granted to him. But, in order to take advantage of this *constitutional* guaranty, the accused must move. The question always arises, does he actually want a speedy trial. The right is there if he demands it, but his failure to so demand will constitute a waiver, on his part, of that right."

In *State v. Thompson*, 38 Wn. (2d) 774, 780-781, 232 P. (2d) 87, the court said:

"The constitution of the state of Washington, amendment 10, gives to persons charged with crime the right 'to have a speedy, public trial.' This constitutional provision, in effect, has been implemented by legislative enactment of Rem. Rev. Stat., § 2312. The constitutional

provision has been referred to a number of times in decisions of this court and there are numerous decisions interpreting Rem. Rev. Stat., § 2312. A partial list of the decisions is as follows:

“State v. Brodie, 7 Wash. 442, 35 Pac. 137; *State v. Lewis*, 35 Wash. 261, 77 Pac. 198; *State v. Seright*, 48 Wash. 307, 93 Pac. 521; *State v. Parmeter*, 49 Wash. 435, 95 Pac. 1012; *State v. Alexander*, 65 Wash. 488, 118 Pac. 645; *State v. Miller*, 72 Wash. 154, 129 Pac. 1100; *State v. Jones*, 80 Wash. 335, 141 Pac. 700; *State v. Nilnch*, 131 Wash. 344, 230 Pac. 129; *State v. Estes*, 151 Wash. 51, 274 Pac. 1053; *State v. Vukich*, 158 Wash. 362, 290 Pac. 992; *State v. Wingard*, 160 Wash. 132, 295 Pac. 116; *State v. Lester*, 161 Wash. 227, 296 Pac. 549; *State v. Thomas*, 1 Wn. (2d) 298, 95 P. (2d) 1036; *State v. Domanski*, 5 Wn. (2d) 686, 106 P. (2d) 591; *State v. Winchell*, 14 Wn. (2d) 420, 128 P. (2d) 643; *State v. Jenkins*, 19 Wn. (2d) 181, 142 P. (2d) 263; *State ex rel. James v. Superior Court*, 32 Wn. (2d) 451, 202 P. (2d) 250.

“ * * * * *

“Elaborating further on the above distinction between constitutional and statutory rights, the thought seems to have been that an accused may waive his *constitutional* rights to a speedy trial by inaction until the time of trial. But with reference to his *statutory* rights, an accused might wait until the time of trial without necessarily waiving those rights. In other words, an accused, even very belatedly, may urge seriously that the statute mandatorily

required dismissal by the court unless good cause is shown to the contrary. The latter thought suggests a duty on the part of the court to find, or a duty or a burden on the part of the prosecution to show, positively and affirmatively good cause justifying delay of the trial for more than sixty days. Absent the finding by the court or the showing by the prosecution, dismissal might be mandatory under the statute. Subsequent decisions of the court seem to have lost sight of this subtle distinction observed by Judge Ellis. In *State v. Estes*, 151 Wash. 51, 274 Pac. 1053, at page 54, a pertinent observation regarding Rem. Rev. Stat., § 2312, reads as follows:

“ ‘ . . . What is a speedy trial, must, of necessity, depend upon the facts and circumstances of the particular case, and something must be left to the discretion of the trial court in such a matter. . . . ’ ”

Nothing in the record shows that this appellant ever demanded an earlier trial.

II.

The issue of the right to aid of counsel in application for a hearing of writ of *habeas corpus* has been answered by the annotation in 162 A. L. R. 922. The general rule on such a question seems to be the following:

“It has been uniformly held however, that the right to the aid of counsel does not exist in habeas corpus proceedings, and that in these proceedings the court may decline to appoint counsel to represent the petitioner on the hear-

ing and disposition of his petition for a writ of habeas corpus—the ground of the decision being that the right to the aid of counsel is confined to criminal proceedings and habeas corpus proceedings are not criminal in their nature, but are civil proceedings to insure the civil liberties of the citizens.”

CONCLUSION

It is respectfully submitted that this appellant has been given the full extent of due process of law by the sovereign state of Washington. He was found guilty by a jury. He was represented by counsel. We have no doubt that he was guilty of the crime for which he is now incarcerated and that no Washington state constitutional right or United States constitutional rights have been violated in obtaining this conviction. It is respectfully submitted that there is no merit to any of the allegations that this appellant has made. We adopt *in toto* the opinion of the Washington State Supreme Court which reviewed this man's conviction on appeal and respectfully submit that this appeal be dismissed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

MICHAEL R. ALFIERI,
Assistant Attorney General,
Attorneys for Appellee.

APPENDIX

THE STATE OF WASHINGTON, *Respondent*, v. WYMAN GRAEBER *et al.*, *Appellants*.¹

Appeal from judgments of the superior court for Snohomish county, No. 1560, Denney, J., entered July 12, 1954, upon a trial and convictions of robbery. Affirmed.

Wesley K. Duce, for appellants.

Arnold R. Zempel and *James Tynan*, for respondent.

OTT, J.—The defendants have appealed from judgments and sentences entered upon the verdict of a jury finding them guilty of the crime of robbery.

On October 7, 1953, two men entered the C & H Market, located on highway 99 in Snohomish county. They took from the shelves four bars of soap in special feature sale wrappers and brought them to the checker. One of the men exhibited a gun and told her it was a holdup. When she opened the cash register, they took the money therefrom and ran outside. The men were pursued by a store employee. While they were fleeing, shots were fired at the employee. A few days later, a lead slug was taken out of a telephone pole and identified as being from a .22 long cartridge.

The defendants were identified by the checker and by the store employee who had pursued them. Defendant Graeber was also identified by a woman customer who had been in the store. A soap wrapper,

similar to the ones containing the soap purchased by the defendants, was found near their trailer house.

Defendant McDonald admitted that he had owned an automatic pistol firing a .22 long cartridge, but stated that it had been pawned prior to the date of the robbery. An empty box that had contained cartridges of the same caliber was found behind the trailer house.

At the trial, each defendant testified in his own behalf. Defendant Graeber testified that he had suffered a leg injury and could not run, and that, therefore, he could not have been one of the men seen running from the store. He stated that he did not own a gun, and knew nothing of the robbery. He said that, on the day in question, he had gone to Everett after work and had not returned to the trailer house until after the time of the robbery.

Defendant McDonald, who was informed against as Thomas David Mayfield, Jr., said that he did not leave the trailer house all evening because he had a severe headache. Graeber was observed near the trailer house shortly after the robbery.

At the time of their arraignment, the court appointed an attorney to represent McDonald. Graeber desired to represent himself, but did state that he needed a lawyer to advise him on legal points. The lawyer appointed to represent McDonald was also appointed to represent Graeber. He does not represent them on this appeal.

Graeber took no part in the examination of the witnesses. The entire trial was conducted by the counsel appointed by the court on behalf of both defendants.

The jury returned a verdict of guilty as to each of the defendants. From the judgments and sentences based upon the verdict of the jury, the defendants have appealed.

[1] The appellants contend that they should have been granted a new trial because no witnesses were subpoenaed in their behalf. Graeber, acting as his own attorney, did not request that any witness be subpoenaed. The court found that the appellants' attorney, after interviewing all of the prospective witnesses suggested by the appellants, determined that their testimony would not be helpful to the defense. No continuance of the trial was requested upon this ground. The court did not abuse its discretion in denying the motion for a new trial upon this ground.

[2, 3] The appellants next contend that the attorney appointed by the court, who tried the case to the jury, was not satisfactory and did not properly defend them. Attorneys are presumed to have sufficient skill and learning to defend an accused adequately. No statutory or constitutional rights of the appellants were violated. *State v. Bradley*, 175 Wash. 481, 490, 27 P. (2d) 737 (1933), and cases cited; *State v. Bird*, 31 Wn. (2d) 777, 783, 198 P. (2d) 978 (1948). The record discloses that the appellants were adequately defended.

[4] The court permitted a trial amendment to the information by the addition of the words "and in the presence of." The entire clause, when amended, read: ". . . take from the person of *and in the presence of Mary Stone.*" (Italics ours.) The amendment was permitted for the purpose of clarification of the method in which the crime was committed. The appellants were not prejudiced or in any manner misled by the amendment. Rule of Pleading, Practice and Procedure 12(2), 34A Wn. (2d) 76. Further, at the time the motion to amend the information was made, the appellants and their attorney made no objection thereto, nor did they request a continuance. The court did not err in granting the motion to amend.

[5, 6] It is next contended that the trial court erred in not granting a new trial because the appellants were not arraigned upon the information as amended. The appellants had entered pleas of not guilty to the information before the trial amendment was granted. The trial amendment did not in any manner change the offense charged or the manner in which the wrongful act was accomplished. By such an amendment, the original pleas of not guilty were in full force and effect as to the amended information. Further, the right to enter pleas to the amended information was waived when, without objection upon that ground, the cause was tried on its merits. *State v. Garland*, 65 Wash. 666, 669, 118 Pac. 907 (1911), and cases cited.

The trial court did not abuse its discretion in denying the motion for a new trial upon any of the stated grounds. *State v. Tharp*, 42 Wn. (2d) 494, 256 P. (2d) 482 (1953).

During the trial, a gun was marked for identification as illustrative of the kind of weapon used by the appellants in the robbery. The state admitted that no guns were found when the appellants were apprehended. The appellants' attorney objected to the admission of the exhibit in evidence, on the ground of improper identification. The objection was sustained. Thereafter, the prosecuting attorney, in his cross-examination of appellant McDonald, made further inquiry concerning the weapon. The attorney for the appellants objected on the ground that the gun exhibit was immaterial and prejudicial. The court had previously sustained the objection as to its materiality, and orally instructed the jury, when it was presented a second time, to disregard any testimony with reference to the gun.

[7] The appellants do not assign error to the court's ruling, but contend on this appeal that the prosecuting attorney, in exhibiting the gun before the jury, was acting in bad faith, to the prejudice of appellants. The trial court ruled that the attorney for the state was acting in good faith in his attempt to have the exhibit admitted for illustrative purposes. The record discloses no error in this ruling.

[8-10] The appellants next contend that the court should have instructed the jury concerning

the defense of alibi. This contention is without merit for the following reasons: (1) There was insufficient evidence to sustain such a defense, therefore it was rightfully withheld from the jury. *State v. Lathrop*, 112 Wash. 560, 562, 192 Pac. 950 (1920). (2) No such instruction was requested by the appellants. *State v. Lathrop, supra*, p. 562. (3) Since no exceptions were taken to the instructions, they became the law of the case. *Irvin v. Spear*, 41 Wn. (2d) 224, 227, 248 P. (2d) 404 (1952), and cases cited.

[11] Finally, appellant McDonald contends that he was prejudiced because the original information stated his name as Thomas David Mayfield, Jr., which name was, in fact, an alias, and that, at the time of his arraignment, he informed the court that his true name was Bluford E. McDonald. A record of his true name was entered in the minutes of the court, as provided by RCW 10.40.050 [*cf.* Rem. Rev. Stat., § 2097], and the prosecuting attorney moved for leave to amend the information to show the true name, Bluford E. McDonald. The motion was granted. At the time of trial, the only name appearing on the information was the alias. Throughout the trial, the appellant had been referred to as Mayfield. When he took the stand in his own behalf, he testified as follows:

“Q. What is your full name? A. Thomas David Mayfield. Q. Is that your given name? A. No. Q. What is your other name, your real name? A. Bluford E. McDonald.”

After the witness had testified, the court ordered the pleadings amended to comply with the proof. Rule of Pleading, Practice and Procedure 12(2), 34A Wn. (2d) 76. The jury was properly instructed with reference thereto. If appellant McDonald was prejudiced by this ruling, the matter was not brought to the court's attention at the time the ruling was made. The court did not err in this regard.

No. 15348

United States
Court of Appeals
for the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

FEB 27 1957

PAUL P. O'BRIEN, C

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LOUIS M. WELSH, ESQ.,
510 South Spring Street,
Los Angeles 13, California.

For Appellee:

ERWIN P. WERNER, ESQ.,
215 West 7th Street,
Los Angeles 14, California.

United States District Court, Southern District of
California, Central Division

No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

AMENDED ACTION FOR DAMAGES
(Personal Injuries)

Leave of court having been first obtained, the
plaintiff files this, his amended complaint.

I.

That at all times mentioned herein, the defend-
ant was and now is a corporation, organized under
the Laws of Kansas, and is authorized to and does
business in the State of California. That further,
the defendant was and now is the owner of, and
operates, a railway system between the terminals
of Chicago, Illinois, and the City of Los Angeles,
and at all times was and now is a common carrier.
That further, at the times mentioned in this com-
plaint the plaintiff and defendant were both en-
gaged in the furtherance of commerce between the
States and foreign countries.

II.

That at the times mentioned in this complaint, the plaintiff was employed by said defendant, as a waiter, on a transcontinental passenger train designated the "Super Chief" and said train was at all times mentioned herein [2*] transporting mail, baggage and passengers between the states and foreign countries.

III.

This court has jurisdiction over the persons and subject matter of this cause of action by reason of the provisions of the Employers Liability Act adopted by the Congress of the United States.

IV.

That on or about the 11th day of March, 1955, while the plaintiff was engaged in his duties as a waiter on the train as aforesaid, the defendant, through its agents and employees, carelessly and negligently caused a large steel door, attached to an ice box, to be slammed against the head of the plaintiff, causing him to be permanently injured in his head, neck, arms, brain, body and nerves, all of which caused him great physical pain and mental anguish and to his damage in the reasonable sum of \$30,000.00 (Thirty Thousand Dollars).

V.

That the plaintiff earns as a waiter approximately three hundred and twenty-two dollars per month (\$322.00), and he is informed and believes

*Page numbering appearing at foot of page of original Certified Transcript of Record.

and therefore alleges, that he will be permanently prevented from following his said vocation as a waiter, all to his damage in the reasonable sum of \$25,000.00 (Twenty-five Thousand Dollars).

VI.

Plaintiff has been compelled to employ the services of a physician in and about the cure of his said injuries, all to his damage in the sum of \$1,500.00 (Fifteen Hundred Dollars).

Plaintiff demands the above cause be tried by a jury.

Wherefore, plaintiff prays judgment against the defendant in the reasonable sum of \$66,500.00 (Sixty-six Thousand Five Hundred Dollars) and for costs incurred herein.

/s/ ERWIN P. WERNER,
Attorney for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1956. [3]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, and in answer to plaintiff's Amended Complaint

on file herein, Admits, Denies and Alleges as follows:

I.

Answering Paragraph IV, this defendant Denies generally and specifically each and every, all and singular, the allegations therein contained and Denies that plaintiff has been damaged to the extent set forth in said paragraph, or at all, or in the sum of \$30,000.00, or in any sum or sums whatsoever, by reason of any carelessness or negligence on the part of this defendant, its agents, servants or employees.

II.

Answering Paragraph V, this defendant does not have sufficient information or belief to enable it to answer the allegations therein contained to the effect that plaintiff earns [5] as a Waiter approximately \$322.00 per month, and for want of such information or belief, defendant Denies said allegation and defendant Denies each and every, all and singular, the remaining allegations set forth in said paragraph and Denies that plaintiff has been damaged in the sum of \$25,000.00, or in any sum, or at all, by reason of any carelessness or negligence on the part of this defendant, its agents, servants or employees.

III.

Answering Paragraph VI, this defendant Denies generally and specifically each and every, all and singular, the allegations therein contained and Denies that plaintiff has been damaged in the sum

of \$1,500.00, or in any sum or sums whatsoever, by reason of any carelessness or negligence on the part of this defendant, its agents, servants or employees.

First Affirmative Defense

As a first, separate and affirmative defense to plaintiff's Amended Complaint on file herein, this defendant Alleges that if plaintiff incurred or sustained any injuries or damages as a result of the matters described in said Complaint, said alleged injuries and/or damages, if any, were solely and proximately caused by the carelessness and negligence of plaintiff in that he failed to exercise ordinary care, or any care, for his own safety and protection at said time and place.

Second Affirmative Defense

As a second, separate and affirmative defense to the Amended Complaint on file herein, this defendant Alleges that if plaintiff incurred or sustained any injuries or damages as a result of the matters described in said Complaint, said alleged injuries and/or damages, if any, were proximately caused and contributed to by the carelessness and negligence of plaintiff in that he failed to exercise ordinary care, or any care, for his own safety and protection at said time and place. [6]

Third Affirmative Defense

As a third, separate and affirmative defense to the Amended Complaint on file herein, this defend-

ant Alleges that if plaintiff incurred or sustained any injuries or damages as a result of the matters described in said Complaint, said alleged injuries and/or damages, if any, were the result of an inevitable and/or unavoidable happening insofar as this defendant, its agents, servants and employees, is or was concerned.

Wherefore, defendant prays that plaintiff take nothing by reason of his Amended Complaint on file herein, and that defendant have and recover its costs and disbursements herein incurred, and for all general and special relief.

ROBERT W. WALKER,
HENRY M. MOFFAT,

By /s/ HENRY M. MOFFAT,
Attorneys for Defendant, The Atchison, Topeka
and Santa Fe Railway Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 21, 1956. [7]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor of the plaintiff, Porter Barrett, and against the defendant, The Atchison, Topeka and Santa Fe

Railroad Company, a Kansas corporation, and fix plaintiff's damages in the sum of \$12,500.

Dated: May 23, 1956.

/s/ CHARLES I. COOPER,
Foreman of the Jury.

[Endorsed]: Filed May 23, 1956. [2*]

United States District Court, Southern District of
California, Central Division

No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

JUDGMENT ON VERDICT

The above-entitled cause was tried before the Court and a duly impanelled jury, on May 22nd, 1956; and oral and documentary testimony was admitted in evidence.

Erwin P. Werner, Esq., appeared as counsel for plaintiff, and Louis M. Welsh, Esq., appeared as counsel for defendant.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

On May 23, 1956, said cause was submitted to the jury, which presented its verdict after deliberation. On order of the Court, the jury was polled and each member thereof stated that the verdict as presented and read was his verdict.

Whereupon, the Court ordered that said verdict be filed and entered as follows: [3]

Now, Therefore, by virtue of the law and by reason of the aforesaid premises,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, Porter Barrett, do have and recover of and from the defendant, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, the sum of Twelve Thousand and Five Hundred Dollars (\$12,500.00), together with costs taxed at \$21.60.

Dated at Los Angeles, California, this 31st day of May, 1956.

/s/ WM. M. BYRNE,

Judge of the District Court.

Receipt of copy acknowledged.

Lodged May 24, 1956.

[Endorsed]: Filed May 31, 1956.

Docketed and entered May 31, 1956. [4]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR RELIEF FROM
JUDGMENT UNDER § 60 (b), FEDERAL
RULES OF CIVIL PROCEDURE

To Plaintiff Porter Barrett and to Erwin P.
Werner, Esq., His Attorney:

You and Each of You Will Please Take Notice
that on Monday, August 13, 1956, at the hour of
10:00 a.m., or as soon thereafter as counsel may be
heard, the defendant, The Atchison, Topeka and
Santa Fe Railway Company, will move the above-
entitled court for relief from the judgment entered
in favor of plaintiff and against defendant on the
31st day of May, 1956, on the grounds and for the
reasons set forth in the motion attached hereto.

Dated this 31st day of July, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant. [6]

[Title of District Court and Cause.]

MOTION FOR RELIEF FROM JUDGMENT

Defendant, The Atchison, Topeka and Santa Fe
Railway Company, moves the court to vacate and

to set aside the final judgment entered against defendant in this cause on the 31st day of May, 1956, on the grounds that:

(1) The judgment was obtained by fraud, misrepresentation and other misconduct of the plaintiff, Porter Barrett;

(2) The judgment was obtained by a conspiracy between the plaintiff, Porter Barrett, and Darrington Weaver, M.D., to defraud and misrepresent the plaintiff's physical condition;

(3) The judgment was obtained through the gross exaggeration by plaintiff of his physical disability allegedly caused by the accident;

(4) The judgment was obtained as a result of a conspiracy between the plaintiff, Porter Barrett, and Darrington Weaver, M.D., for the purpose of grossly exaggerating plaintiff's physical [7] disability allegedly caused by the accident;

(5) The judgment was obtained as a result of collusion between the plaintiff, Porter Barrett, and Darrington Weaver, M.D., to defraud and misrepresent for the purpose of obtaining money for both the said plaintiff, Porter Barrett, and the said Darrington Weaver, M.D.

This motion is made and based upon the Affidavits of George Franklin Richcreek, William Perry, Joe Wilson Elliott, John G. Zelezny, Alice Madsen and Louis M. Welsh, all of which are served and filed herewith; upon the reporter's transcript of

proceedings on file herein, the deposition of Porter Barrett on file herein, the motion pictures referred to in the Affidavits of George Franklin Richcreek and Joe Wilson Elliott, which motion pictures will be displayed and exhibited to the court at the hearing; upon certain certified copies of judgments of conviction and sentence of Darrington Weaver, M.D., to be filed herein before the hearing on this motion; upon all other records, papers, pleadings, exhibits and evidence on file herein, the oral testimony introduced at the trial and the physical motions and conduct of plaintiff, Porter Barrett, during the trial, which motions and conduct were observed by the court and all persons present.

Dated this 31st day of July, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant. [8]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM PERRY

State of California,
County of Los Angeles—ss.

William Perry, being first duly sworn on oath,
deposes and says:

That he is an investigator licensed and bonded under the laws of the State of California, and that at the request of the defendant, The Atchison, Topeka and Santa Fe Railway Company, he investigated the plaintiff, Mr. Porter Barrett, on May 26, 1956.

At 11:55 a.m. of that day affiant observed Mr. Porter Barrett driving a 1950 light ivory Mercury automobile, license number KLG 190, California, 1956, with white side wall tires. Mr. Barrett was driving alone, and at the time affiant first observed him he was returning to his home at 2929 Van Buren Place in the City of Los Angeles, County of Los Angeles. Mr. Porter Barrett parked his automobile at the front curb, alighted from [21] the automobile with a small package in his hand and entered the above address. Barrett then emerged from his home, returned to the automobile on two separate occasions and each time removed some small item from the automobile and carried it back to the house.

At 12:30 p.m. Mr. Barrett and a young woman came out of the home. They both entered the automobile, Mr. Barrett sitting in the driver's seat. Mr. Barrett then drove the said Mercury automobile to Central Avenue and 67th Street at a normal speed, during which time affiant followed the said Mercury automobile in his automobile and observed the occupants of the said Mercury.

At all times mentioned herein the weather was warm, the day was bright and visibility was excep-

tionally good. Affiant closely observed Mr. Porter Barrett and found that he appeared to be completely normal in all respects. Mr. Barrett's posture was erect and his shoulders were equal, his neck did not twitch and he in no way contorted his head, neck or shoulders.

/s/ WILLIAM PERRY.

Subscribed and sworn to before me this 17th day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State
of California.

My Commission Expires May 9, 1960. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF
GEORGE FRANKLIN RICHCREEK

State of California,
County of Los Angeles—ss.

George Franklin Richcreek, being first duly sworn on oath, deposes and says:

That he is employed by the Stein Investigation Agency, a licensed and bonded investigation agency in the State of California, and that on behalf of that organization he conducted an investigation of

Porter Barrett, plaintiff in the above-entitled action.

On May 28, 1956, at 6:30 a.m. affiant drove his automobile to plaintiff's address at 2929 Van Buren Place, Los Angeles, California, and sat in his automobile surveying said address awaiting the appearance of the plaintiff, Porter Barrett.

At 11:05 affiant observed the plaintiff, Robert Barrett, driving a light gray Mercury Tudor bearing license number KLG 190. [23] Affiant then started his automobile and followed the said Mercury automobile until the latter came to rest in the parking lot of a market in the 1500 block of Jefferson Boulevard. Affiant stopped his automobile and observed plaintiff, Porter Barrett, emerge from the said Mercury and enter the market. At approximately 11:10 a.m. the plaintiff, Porter Barrett, came out of the market, walked to his automobile and drove out of the parking lot to the 300 block on East 33rd Street.

At the time Mr. Porter Barrett emerged from his automobile and entered the market and at the time he returned from the market to his automobile and drove away therefrom, affiant observed that the said plaintiff, Porter Barrett, did not jerk his head, nor was there any twitch, tic or other unnatural movement of his head, neck or shoulders. As the said plaintiff departed from the market, entered his automobile and drove away, affiant took 22 feet of motion pictures of the said Porter Barrett at an

exposure of $f/4$ from an approximate distance of 150 feet with a 16 mm. 220-T Bell and Howell magazine load camera factory locked at 16 frames per second, with a four-inch lens. All subsequent photographs which were taken of the said Porter Barrett were taken with the same camera herein described.

The said Proter Barrett entered a building at 351 East 33rd Street, in which building are the offices of Darrington Weaver, M.D. At 11:25 a.m. affiant took 23 feet of motion pictures of the plaintiff at an exposure of $f/4$ and at an approximate distance of 130 feet. These motion pictures reveal plaintiff Barrett emerging from his automobile, walking up the street, returning to his automobile, again leaving his automobile and entering the doctor's office. During this time affiant observed that plaintiff Barrett did not twitch, jerk or make any other unnatural or abnormal movement of his head, neck or shoulders.

At 12:20 p.m. affiant took 12 feet of motion pictures [24] at an exposure of $f/4$ which show plaintiff Barrett leaving the doctor's office and walking to a lumber supply shop which is in the Mox Wrecking Company at 33rd and Maple Streets. During this time plaintiff Barrett's head and neck were perfectly normally held, and no bobbing or weaving was observed. Plaintiff Barrett departed from the wrecking company and returned to the doctor's office carrying two fluorescent bulbs, and

at this time 12 more feet of motion pictures were taken of this activity.

At 1:05 p.m. affiant took 5 feet of motion pictures of plaintiff Barrett as the latter left the doctor's office and entered his automobile. Said plaintiff drove the automobile for a few blocks, and affiant observed that plaintiff's head suddenly started jerking. Said plaintiff Barrett then drove back to the office of Dr. Darrington Weaver and entered said office. As he entered the office his head was twitching and jerking.

At 2:45 p.m. plaintiff Barrett departed from the doctor's office with an unidentified man, who drove plaintiff Barrett's automobile, plaintiff Barrett then sitting in the passenger side of the front seat. The automobile stopped at the 3000 block on South Maple at a market. The unidentified man who was driving the automobile got out of the car, went into the store and returned to the automobile. The said unidentified person then continued to drive the car and parked it on Bixel Street near 6th Street. Twenty-five feet of motion pictures were taken of plaintiff Barrett walking on Bixel Street to 6th Street, then east on 6th Street, with his head bobbing and twitching. At 3:10 p.m. plaintiff Barrett and the unidentified man entered the Professional Building at 1052 West 6th Street, in which building are located the offices of Morris L. Goren, M.D.

At 4:00 p.m. plaintiff Barrett and the unidentified man departed from the said Professional Building, walked back to 6th Street to the automobile, and the unidentified man drove the [25]

automobile back to Dr. Darrington Weaver's office on 33rd Street. Affiant took 25 feet of motion pictures showing plaintiff Barrett walking from the Professional Building and back toward his automobile.

Affiant ceased surveillance at 5:30 p.m., at which time plaintiff Porter Barrett had not emerged from the office of Dr. Darrington Weaver.

The records of the Department of Motor Vehicles in Sacramento reveal that California license number KLG 190 was issued on January 27, 1956, to Porter Barrett of 2929 Van Buren Place, Los Angeles, California, for attachment to a 1950 Mercury.

/s/ GEORGE FRANKLIN RICHCREEK.

Subscribed and sworn to before me this 16th day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF JOE WILSON ELLIOTT

State of California,
County of Los Angeles—ss.

Joe Wilson Elliott, being first duly sworn on oath,
deposes and says:

That he is employed by the Stein Investigation Agency, a licensed and bonded investigation agency in the State of California, and that on behalf of that organization he conducted an investigation of Porter Barrett, plaintiff in the above-entitled action.

At 2:20 p.m. on June 25, 1956, affiant drove his automobile to the vicinity of plaintiff Porter Barrett's residence and observed Mr. Barrett's vehicle, namely, a 1950 Mercury Tudor, license number KLG 190, parked in the 3100 block on Van Buren Place. At 2:43 p.m. affiant observed plaintiff Porter Barrett, accompanied by a man and a woman, enter the said Mercury automobile. [27] The plaintiff sat in the driver's seat and drove the automobile away. Affiant followed the said Mercury automobile, and at 3:02 p.m. plaintiff Barrett and his two companions arrived at the Santa Fe Commissary at 2146 East 7th Street, where the male companion got out of the car, appeared to enter the Commissary and later returned to the Mercury automobile. Affiant did not observe plaintiff Porter Barrett leave the automobile. Said plaintiff was wearing a straw cap with a visor, and a short sleeved shirt. His head was perfectly steady, and there was absolutely no abnormal movement noted.

At 3:07 p.m. plaintiff Porter Barrett drove the said Mercury automobile from the Santa Fe Commissary and parked it in the 700 block on South Mateo Street. At this place his male companion departed from the vehicle, and at 3:11 p.m. affiant

took 25 feet of motion pictures of plaintiff at an exposure of $f/4$ and from an approximate distance of 100 feet while the said plaintiff Barrett was sitting in the driver's seat of his automobile. At this time and at all times that affiant observed plaintiff Barrett he appeared to be perfectly normal. These motion pictures and all other motion pictures taken by affiant were taken with a Bell and Howell 200-T magazine load camera factory locked at 16 frames per second, with a three-inch lens. The film used was Eastman Kodak 16 mm. Kodachrome in 50-foot magazines. At 3:15 p.m. the male companion returned to the automobile, and plaintiff Barrett drove the automobile away.

At 3:35 p.m. plaintiff Barrett parked his automobile in a marked parking lot in the 1900 Block on West Adams Boulevard. Barrett entered the market, and upon departure crossed a side street and entered a liquor store. Affiant took 13 feet of motion pictures of Barrett entering and leaving the market, at an exposure of $f/4$ and from an approximate distance of 150 feet.

At 3:45 p.m. affiant took 12 feet of motion pictures of [28] plaintiff Barrett at an exposure of $f/4$ and from an approximate distance of 200 feet while plaintiff Barrett was returning from the liquor store to his parked car. Plaintiff Barrett drove the automobile, with his two companions, to the 3100 block on Van Buren Place, where he arrived at 3:55 p.m. Plaintiff Barrett and his two companions left the automobile, but affiant did not

observe into which of several residences they entered because his vision was obscured by hedges and other foilage. Affiant did not see plaintiff Barrett or his companions subsequently on that date, namely, June 25, 1956.

On June 26, 1956, at 7:00 a.m. affiant took up surveillance in the 3100 block on Van Buren Place, where he observed the 1950 Mercury automobile bearing license number KLG 190. At 8:40 a.m. plaintiff Barrett, accompanied by a man and two women, entered the said Mercury automobile. Affiant observed plaintiff Barrett, and he had no disability and manifested no abnormal physical conditions; in particular, his head, neck and shoulders were normal and did not jerk, weave or bob. Plaintiff Barrett got into the car on the driver's seat and drove the vehicle, containing his three companions, away.

Affiant followed the said Mercury automobile and observed that plaintiff Barrett parked his vehicle behind the Wild Goose Restaurant on Ventura Boulevard and Fulton at 9:10 a.m. One woman departed from the vehicle, and plaintiff Barrett and his two remaining companions departed. Plaintiff Barrett continued to drive the automobile.

Affiant continued to follow the said Mercury automobile, and at 9:15 a.m. plaintiff Barrett parked his car and entered the Thriftmart at Ventura Boulevard and Coldwater Canyon. At 9:25 a.m. affiant took 25 feet of motion pictures at an

exposure of $f/4$ from an approximate distance of 150 feet as the said Porter Barrett departed from the Thriftmart Store and walked to his [29] automobile and entered it.

Porter Barrett then drove the automobile, and affiant again followed. At 10:05 a.m. Porter Barrett parked his automobile on West 4th Street near June Street, and all occupants remained seated in the automobile. At 10:20 a.m. Porter Barrett drove the automobile away, and at 10:35 a.m. he parked the automobile near a liquor store at Jefferson and Kenwood, emerged from the automobile and entered said liquor store. At 10:40 a.m. affiant took 15 feet of motion pictures of the said Porter Barrett at an exposure of $f/4$ and from an approximate distance of 150 feet as the said Porter Barrett left the liquor store and walked to his automobile. Barrett then drove the automobile away, and at 10:45 a.m. affiant took 3 feet of motion pictures at an exposure of $f/4$ and from an approximate distance of 250 feet, of Porter Barrett, showing the said Porter Barrett walking from his automobile to a residence in the 3100 block on Van Buren Place. This residence is a four-unit building numbered from 3108 to 3110 $\frac{1}{2}$.

At 11:50 a.m. affiant took 4 feet of motion pictures at an exposure of $f/4$ from an approximate distance of 250 feet of plaintiff Porter Barrett as he returned and entered his automobile accompanied by a man and a woman. Again the plaintiff sat in the driver's seat and drove off. Affiant fol-

lowed the said automobile which plaintiff Porter Barrett was driving, and at 12:00 noon he took 20 feet of motion pictures of said Porter Barrett at an exposure of $f/4$ and from distances varying between 125 feet and 200 feet as the said Porter Barrett walked north on Broadway to Washington Boulevard. Porter Barrett then turned the corner and entered a surplus store.

At 12:10 p.m. affiant took 9 feet of motion pictures at an exposure of $f/4$ and from distances varying between 125 feet and 200 feet, of the said Porter Barrett as he walked south on Broadway and returned to his automobile. [30]

Porter Barrett drove the automobile, and affiant again followed. Barrett parked the said Mercury automobile in a parking lot in the 1000 block on South Main Street, and affiant took 33 feet of motion pictures at an exposure of $f/4$ and from distances varying between 125 feet and 250 feet, of the said Porter Barrett as he walked from the parking lot to the Angelica Uniform Company store at 1101 South Main Street. At 12:35 p.m. affiant took 29 feet of motion pictures at an exposure of $f/4$ and from distances varying between 125 feet and 250 feet, of the said Porter Barrett as he returned to the parking lot and entered his automobile. Affiant did not see the said Porter Barrett subsequently.

At all times affiant observed plaintiff Porter Barrett he was completely normal, his posture was

erect and his shoulders were equal. His neck did not twitch, and he in no way contorted his body, neck or head.

/s/ JOE WILSON ELLIOTT.

Subscribed and sworn to before me this 16th day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [31]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN G. ZELENZY

State of California,
County of Los Angeles—ss.

John G. Zelenzy, being first duly sworn on oath, deposes and says:

That he is an attorney at law licensed to practice in the State of California, and that he is at present associated in the practice of law with Louis M. Welsh, counsel for the defendant in the above-entitled action.

On June 6, 1956, at about 1:00 o'clock p.m., a fairly large, dignified colored gentleman entered our offices in Suite 336, Security Building, 510

South Spring Street, and identified himself as Dr. Darrington Weaver. This gentleman gave affiant a card stating his name to be Darrington Weaver, M. D., which card is attached hereto as Exhibit A and by this reference made a part hereof. [32]

Dr. Weaver asked to see Mr. Welsh, and affiant informed him that Mr. Welsh was not in the office and that his secretary was out to lunch. Thereupon Dr. Weaver told affiant that he was delivering the Satisfaction of Judgment in the above-entitled matter for Mr. Werner, and he left these papers with affiant. The original of said Satisfaction of Judgment which Dr. Weaver delivered is attached to the Affidavit of Louis M. Welch on file herein.

/s/ JOHN G. ZELEZNY.

Subscribed and sworn to before me this 23rd day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [33]

EXHIBIT A

Darrington Weaver, M.D.
351 East Thirty-third Street
Los Angeles 11, Calif.
ADams 3-3295

If No Answer Please Call ADams 2-8084

[Title of District Court and Cause.]

AFFIDAVIT OF ALICE MADSEN

State of California,

County of Los Angeles—ss.

Alice Madsen, being first duly sworn, deposes and says:

I am secretary to Louis M. Welsh, Esq. On the 20th day of June, 1956, I was taking dictation in Mr. Welsh's private office when I heard the door to the outer office open. I went to the outer office and greeted a colored gentleman whose neck was twitching. I asked him if he was Mr. Barrett, and he informed me that he was. I asked Mr. Barrett to be seated for a few minutes until Mr. Welsh could see him. I then went back into Mr. Welsh's private office and did not see Mr. Barrett again.

/s/ ALICE MADSEN.

Subscribed and sworn to before me this 31st day of July, 1956.

[Seal] /s/ TOBIA LEE,
Notary Public in and for Said County and State of
California.

My Commission Expires September 21, [35]
1957.

[Title of District Court and Cause.]

AFFIDAVIT OF LOUIS M. WELSH

State of California,

County of Los Angeles—ss.

Louis M. Welsh, being first duly sworn on oath, deposes and says:

That during the trial of the above-entitled action on May 22, 1956, I noticed a large, portly, dignified colored gentleman about sixty-five years old sitting in the spectators' section of the courtroom watching the trial as it proceeded. This gentleman walked in and out of the courtroom at different times during the first day of trial, and on several occasions he confidentially conferred with plaintiff's counsel, Erwin P. Werner, Esq. On at least two occasions after such a confidential conference, the said colored gentleman would leave the courtroom and later return and report something to Mr. Werner. These activities led me to believe that this gentleman was an investigator for the plaintiff, and I [36] inquired of Mr. Werner during the course of the trial whether or not this gentleman sitting in the spectators' section was an investigator or a witness. Mr. Werner replied that the gentleman was neither, but that he was Dr. Darrington Weaver, plaintiff's physician.

On June 5, 1956, after the judgment was rendered, I forwarded by mail to Mr. Erwin P. Werner the original and two copies of a Satisfaction of

Judgment to be signed by the plaintiff and his counsel. In my letter of transmittal, I informed Mr. Werner that before filing this document, I would present him with a draft from the Santa Fe Railway Company in full payment of the judgment. I was away from my office on June 6, 1956, and when I returned on June 7 I found on my desk the original and two copies of the Satisfaction of Judgment properly signed by Erwin P. Werner and Porter Barrett and acknowledged before a notary public by the name of Wertie Clarice Weaver, whom I am informed is the wife of Dr. Darrington Weaver. The original of said Satisfaction of Judgment is attached hereto marked Exhibit A and by this reference made a part hereof.

Attached to said original and copies of the Satisfaction of Judgment was a note from John G. Zelezny, Esq., an Attorney at Law, who is associated with me in the practice of law, which note read: "These were delivered by Dr. Weaver from Mr. Werner. JZ." The original of this note is also attached hereto marked Exhibit B and by this reference made a part hereof.

Subsequent to the rendition of the verdict and the judgment it was also necessary to obtain the signature of Mr. Porter Barrett on apportionment forms of the Railroad Retirement Board so that the defendant would be authorized to repay the Federal Government for the money that the Government had advanced to the plaintiff, Porter Barrett, under the provisions of the Railroad Retire-

ment Act while Barrett was allegedly incapacitated, out of [37] work and awaiting the trial of this action.

On June 19, 1956, I mailed three copies of said apportionment forms to Erwin P. Werner, Esq., and requested that Mr. Porter Barrett execute them and return them to me for transmittal to the defendant railway company.

The following morning (June 20, 1956) I was away from my office, and when I returned at about 11:45 a.m. there was a telephone message on my desk informing me that a Mr. Weaver had telephoned and that I should return his call at ADams 3-3295. This telephone number is the same number which is listed for Darrington Weaver, M.D., and which telephone number also appears on the business card of Darrington Weaver, M. D., which is attached as Exhibit A to the Affidavit of John G. Zelezny on file herein. Before I was able to return this telephone call I received a call from a gentleman who identified himself as Dr. Darrington Weaver and who asked me how soon the Santa Fe could deliver its draft in payment of the judgment in favor of Mr. Barrett. I informed Dr. Weaver that I would first have to receive the apportionment forms which I had mailed to Mr. Werner the previous day, and that those apportionment forms would then be sent to the Santa Fe, the draft would be ordered from Chicago and that within a week it could be delivered. Dr. Weaver told me that he would appreciate our expediting the matter, and I

told him that we would not delay. Dr. Weaver then asked me if I expected to be in my office the afternoon of that date, namely, June 20, 1956, and I said that I did. Dr. Weaver said that Mr. Barrett would personally deliver the apportionment forms that afternoon, and I thanked him. That was the end of the telephone conversation.

That afternoon, namely, June 20, 1956, Mr. Porter Barrett came to my office at Suite 336, Security Building, 510 South Spring Street, Los Angeles 13, California, for the purpose of delivering three copies of Railroad Retirement Board Apportionment forms. I [38] was in my private office when Mr. Barrett entered the outer office, and did not see him for about five or ten minutes after he had entered our suite.

I then walked to the outer office, greeted Mr. Barrett by shaking his hand and received the apportionment forms from him. Mr. Barrett and I conversed, and during this conversation Mr. Barrett asked me to get the check as soon as possible, because he needed the money very badly. He stated that he would end up with very little money out of the judgment, and that when he got through paying everyone off he would have only \$800.00 or \$900.00 left, because he had to make large payments to other people.

I observed Mr. Barrett jerking his neck in rapid, frequent jerks of about one per second or one per second and a half, in the same manner as he jerked

his neck during the trial of the above-entitled matter. In addition, Mr. Barrett's left shoulder was lower than his right shoulder, and his stance and walk caused him to list to the left. He grimaced almost constantly and gave every indication of experiencing great pain. Occasionally he would strike his head with his hand in what appeared to be a futile attempt to relieve the pain and jerking. I talked with Barrett for about five or six minutes, and at no time during my conversation with Mr. Barrett did he cease from these jerkings and contortions.

Barrett then left my office, and I opened the door of my office, stepped into the hall and looked toward the elevators of our building, where I could observe Barrett from behind and from the side, although he did not observe me. I saw Barrett waiting for the elevators, and when the elevator arrived I saw him step onto the elevator. During my observation of Barrett in the hallway, Barrett stood perfectly normally, his posture was erect and his shoulders were equal, his neck did not twitch and he in no way contorted his body, neck or head. This was the first time that I [39] had seen Mr. Barrett when he was not aware that I was observing him, and this was the first time that I had seen Mr. Barrett when he was not jerking, contorting and twitching his neck or body.

The Affidavits of William Perry and George Franklin Richcreek disclose that while Mr. Barrett was under surveillance from May 26, 1956, to May

28, 1956, he displayed no jerking, twitching or other abnormality; that on May 28, 1956, at 1:05 p.m. plaintiff Barrett began to twitch and jerk while he was en route to Dr. Morris Goren's office. When this information was first communicated to me, I instructed the investigators to cease their surveillance until after the time had expired within which a motion for new trial could be made. I had concluded that this sudden jerking was the result of one of three causes, namely:

(1) It was caused by an affliction beyond the plaintiff's control, and was thus genuine; (2) it was the result of a voluntary act on the part of the plaintiff, done for the purpose of misleading Dr. Morris Goren; or (3) the plaintiff had observed that he was under surveillance and he voluntarily began to twitch in order to mislead those who were observing him.

Later, on July 2, 1956, during a conversation with Erwin P. Werner, Esq., plaintiff's counsel, I learned from Mr. Werner that plaintiff Barrett had obtained knowledge of the fact that he was under observation and that someone was taking motion pictures of him.

The Affidavit of Joe Wilson Elliott and the motion pictures which will be shown to the court disclose that plaintiff had no recurrence of the jerking attack while he was being observed after the ten-day period for the motion for new trial had expired.

/s/ LOUIS M. WELSH.

Subscribed and sworn to before me this 31st day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [40]

[Title of District Court and Cause.]

EXHIBIT A

SATISFACTION OF JUDGMENT

The judgment herein having been paid, full satisfaction is hereby acknowledged of said judgment docketed and entered on the 31st day of May, 1956, in favor of plaintiff and against defendant above named, and the clerk is hereby authorized and directed to enter full satisfaction of record in said action.

Dated this 6th day of June, 1956.

/s/ ERWIN P. WERNER,
Attorney for Plaintiff,

/s/ PORTER BARRETT,
Plaintiff.

State of California,
County of Los Angeles—ss.

On this 6th day of June, 1956, before me, Wertie Clarice Weaver, a notary public in and for said

County and State residing therein, duly commissioned and sworn, personally appeared Erwin P. Werner and Porter Barrett, known to me to be the same persons whose names are subscribed to the within instrument, and they duly acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public in and for Said
County and State. [42]

EXHIBIT B

[Memo Pad]

Santa Fe

Swift, Sure Freight and Passenger Service Is a
Santa Fe Tradition

6/6/56.

These were delivered by Dr. Weaver from Mr.
Werner.

/s/ J. Z.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1956. [43]

[Title of District Court and Cause.]

AFFIDAVITS FILED BY PLAINTIFF IN OP-
POSITION TO DEFENDANT'S MOTION
FOR RELIEF FROM JUDGMENT

[Title of District Court and Cause.]

AFFIDAVIT OF ARNOLD G. ROBERTS

State of California,

County of Los Angeles—ss.

Arnold G. Roberts is my name. I am an American. I live at 1428 East 45th Street, Los Angeles, California. I have been steadily employed by the Atchison, Topeka and Santa Fe Railway Company in the capacity of dining car cook for about eleven (11) years.

I have known and worked with Porter Barrett for years just prior to the date of his March 11, 1955, accident and have had frequent contact with him following the aforementioned date of accident.

Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals during our conversations and the same observations are evidenced up to the present time.

/s/ ARNOLD G. ROBERTS. [53]

State of California,
County of Los Angeles—ss.

On this third day of July, 1956, before me, Wertie Clarice Weaver, a Notary Public in and for the County of Los Angeles and State of California, duly commissioned and residing therein, personally appeared Arnold G. Roberts, known to me to be the person whose name is affixed to the foregoing statement and he acknowledged to me that he executed the same of his own free will and voluntary act.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [54]

[Title of District Court and Cause.]

AFFIDAVIT OF LEMAUD J. NASH

State of California,
County of Los Angeles—ss.

Lemaud J. Nash is my name. I am an American. I live at 9230 Hooper Avenue, Los Angeles, California. I have been steadily employed by the Atchison, Topeka and Santa Fe Railway Company in the capacity of dining car waiter for about twenty-one (21) years.

I have known and worked with Porter Barrett for years just prior to the date of his March 11, 1955, accident and have had frequent contact with him following the aforementioned date of accident.

Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals during our conversations and the same observations are evidenced up to the present time.

/s/ LEMAUD J. NASH. [55]

State of California,
County of Los Angeles—ss.

On this third day of July, 1956, before me, Wertie Clarice Weaver, a Notary Public in and for the County of Los Angeles and State of California, duly commissioned and residing therein, personally appeared Lemaud J. Nash, known to me to be the person whose name is affixed to the foregoing statement and he acknowledged to me that he executed the same of his own free will and voluntary act.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [56]

[Title of District Court and Cause.]

AFFIDAVIT OF RHODES ROBINSON

State of California,
County of Los Angeles—ss.

I, Rhodes Robinson, being first duly sworn depose and say that I have been a cook for the dining car department of the Santa Fe Railway Company for more than ten years and have been associated with Porter Barrett for that length of time; that Porter Barrett and I live in the same neighborhood; that I saw him often before his accident of March 11, 1955, and since that date; that I see Mr. Barrett now about fifteen days every month and during the past several months I have observed him intermittently jerking his head.

/s/ RHODES ROBINSON.

Subscribed and sworn to before me a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [57]

[Title of District Court and Cause.]

AFFIDAVIT OF WALTER BOZEMAN

State of California,
County of Los Angeles—ss.

Walter Bozeman is my name. I am an American. I live at 11251½ East 65th Street, Los Angeles, California. I have been steadily employed by the Atchison, Topeka and Santa Fe Railway Company in the capacity of dining car cook for about thirteen (13) years.

I have known and worked with Porter Barrett for years just prior to the date of his March 11, 1955, accident and have had frequent contact with him following the aforementioned date of accident.

Several months after the accident heretofore mentioned I noticed Porter Barrett jerking his head at intervals during our conversations and the same observations are evidenced up to the present time.

/s/ WALTER BOZEMAN. [58]

State of California,
County of Los Angeles—ss.

On this ninth day of July, 1956, before me, Wertie Clarice Weaver, a Notary Public in and for the County of Los Angeles and State of California, duly commissioned and residing therein, personally appeared Walter Bozeman, known to me to be the

person whose name is affixed to the foregoing statement and he acknowledged to me that he executed the same of his own free will and voluntary act.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [59]

[Title of District Court and Cause.]

AFFIDAVIT OF JESSE MITCHELL

State of California,
County of Los Angeles—ss.

Jesse Mitchell, being first duly sworn deposes and says that he is now and has been for many years an employee for the Atchison, Topeka and Santa Fe Railway Company; that during the past years he has worked with Porter Barrett and has had occasion to observe him closely; that subsequent to the date of his accident, March 11, 1955, he has noticed that Porter Barrett jerks his head on several occasions during the day; that at times the head jerking is more pronounced than at other times; that he first noticed this condition in Mr. Barrett about a year ago; that he was subpoenaed by the plaintiff Barrett to testify in his action in the Fed-

eral Court against the Atchison, Topeka and Santa Fe Railway, but failed to do so upon advice of Santa Fe representative on the grounds that he was not legally served.

/s/ JESSE M. MITCHELL. [60]

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD GOLDSMITH

State of California,
County of Los Angeles—ss.

Richard Goldsmith, being first duly sworn deposes and says that he is now and has been a waiter continuously for the Atchison, Topeka and Santa Fe Railway Company for more than eleven years; that during the last five years of that time he has worked with Porter Barrett and has had occasion to observe him closely; that subsequent to the date of his accident, March 11, 1955, he has noticed that Porter Barrett jerks his head on several occasions during the day; that at times the head jerking is more pro-

nounced than at other times; that he first noticed this condition in Mr. Barrett about a year ago; that he was subpoenaed by the Plaintiff Barrett to testify in his action in the Federal Court against the Atchison, Topeka and Santa Fe Railway, but failed to so testify upon advice of Santa Fe representative on the grounds that he was not legally served.

/s/ RICHARD GOLDSMITH. [62]

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [63]

[Title of District Court and Cause.]

AFFIDAVIT OF CALVIN DAVIS

State of California,
County of Los Angeles—ss.

Calvin Davis, being first duly sworn deposes and says that he is now and has been an employee for the Atchison, Topeka and Santa Fe Railway Company for many years; that during the past years he has worked with Porter Barrett and has had occasion to observe him closely; that subsequent to the date of his accident, March 11, 1955, he has noticed

that Porter Barrett jerks his head on several occasions during the day; that at times the head jerking is more pronounced than at other times; that he first noticed this condition in Mr. Barrett about a year ago; that he was subpoenaed by the Plaintiff Barrett to testify in his action in the Federal Court against the Atchison, Topeka and Santa Fe Railway, but failed to so testify upon advice of Santa Fe representative on the grounds that he was not legally served.

/s/ CALVIN DAVIS, JR.

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [64]

[Title of District Court and Cause.]

AFFIDAVIT OF
DARRINGTON WEAVER, M.D.

State of California,
County of Los Angeles—ss.

Darrington Weaver, M.D., being first duly sworn deposes and says: that he is licensed by the State of California to practice medicine and surgery; that

prior to and subsequent to December 17, 1955, he was so licensed; that on the aforesaid date at the hour of 7:30 p.m. he consulted with, made an examination of and administered treatment to Porter Barrett; that prior to aforesaid date and time affiant had never met, had never seen and had never heard of Porter Barrett; that subsequent to December 17, 1955, affiant referred Porter Barrett to Morris L. Goren, M.D., for examination and treatment; that on the 24th day of December, 1955, the following letter was written to the Atchison, Topeka and Santa Fe Railway Company, Dining Car Department, 2014 South Wentworth Avenue, Chicago 16, Illinois.

“To Whom This May Concern: This is to certify that Mr. Porter Barrett of 2929 Van Buren Place, Los Angeles, California, has been and is now under my care for an injury to his head; and that his physical condition is of such nature and extent as to incapacitate him for the performance of his usual duties. Dated this [65] 24th day of December, 1955. Darrington Weaver, M.D.”

That on January 7, 1956, in response to the aforesaid letter, affiant received an answer by mail from the Dining Car Department of the Atchison, Topeka and Santa Fe Railway Company, requesting in substance the diagnosis arrived at; that following the receipt of the aforementioned letter affiant received another letter from the Dining Car Department of the Atchison, Topeka and Santa Fe Railway Company dated January 25, 1956; that on

January 30, 1956, affiant mailed the following letter to the Dining Car Department of the Atchison, Topeka and Santa Fe Railway Company:

“January 30, 1956.

The Atchison, Topeka and Santa Fe Railway
Company,

Dining Car Department,
2014 South Wentworth Avenue,
Chicago 16, Illinois,

Attention: Mr. W. H. Ford.

Re: Porter Barrett.

Gentlemen:

Replying to your communications of recent date relative to the above-captioned patient, I herein state that Mr. Barrett is incapacitated for the performance of his usual duties because of the following:

- (1) Traumatic torticollis.
- (2) General neurosis and psychosis,
due to trauma.
- (3) General Debility.

This patient has been examined also by other specialists who have corroborated the above diagnosis and treated him for the same conditions. I shall find pleasure in furnishing you with the names and addresses of these physicians upon receipt of permis-

sion from Mr. Barrett. The disability is both total and permanent.

Respectfully yours,

DARRINGTON WEAVER,
M.D."

DW:pvw.

"That several days following the rendition of the judgment, Mr. Erwin P. Werner (being engaged in trial) requested affiant to deliver to Mr. Louis Welch certain [66] release papers; that affiant carried the papers to the office of Mr. Louis Welch and after being told by a gentleman in Mr. Welch's office that Mr. Welch was not there and would not return during the day, affiant left the papers with the gentleman with a request that the papers be given to Mr. Welch; that affiant, at the time aforementioned, identified himself and presented the gentleman with affiant's professional card and told the gentleman to say to Mr. Welch that Mr. Werner was engaged in trial; that affiant has never inquired of Mr. Welch, nor anyone in or out of Mr. Welch's office at any time anything about a check; that affiant has never in his lifetime spoken to Mr. Louis Welch a word, either on the telephone or in any other manner about anything; that affiant was present during a brief period of the trial and was ready to testify if called upon and that during that time affiant made a telephone call to his office; that affiant was granted a full and unconditional pardon from the Governor of California on December 23,

1953, for the offenses on which affiant was convicted as stated in defendant's brief and affidavit; that affiant did not conspire with Porter Barrett at any time to exaggerate his injuries nor to defraud the defendant.

[Seal] /s/ DARRINGTON WEAVER, M.D.

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles, and State of California, this 6th day of August, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [67]

[Title of District Court and Cause.]

AFFIDAVIT OF PORTER BARRETT,
PLAINTIFF

State of California,
County of Los Angeles—ss.

Porter Barrett, being first sworn deposes and says: that he is the plaintiff in the above-matter and that he has read the brief and affidavits filed by the defendant; that on the 17th day of December, 1955, he went to Dr. Weaver's office for consultation and treatment; that prior to the aforementioned date he had never met nor had ever seen Dr. Weaver before; that soon thereafter, on the recommendation of Dr. Weaver, he went to Dr. Goren for

examination and treatment, all of which has been testified to; that since the trial he has continued his treatment with Dr. Goren and is now receiving weekly treatments from him; that affiant still suffers from the torticollis, but not as severe since the trial; that these attacks come on principally when he is excited or nervous; that during the trial he testified that he was seldom free from it; that by this, he meant that at times varying from one to four hours, he did not jerk; that during times of stress, such as the trial, taking of deposition, seeing doctors or lawyers the jerking is worse; that he has no control over the condition; that he further affirms that at no time has Dr. Weaver advised him what to do; that he still further affirms that at no time has he conspired with Dr. Weaver to exaggerate his injuries; that on [68] the 10th day of April, 1956, the affiant was examined by Dr. John B. Doyle, at Room 601, 1930 Wilshire Boulevard, Los Angeles, California, at the request of the defendant.

/s/ PORTER BARRETT.

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 4th day of August, 1956.

/s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1956. [69]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN B. DOYLE, M.D

State of California,
County of Los Angeles—ss.

John B. Doyle, M.D., being first duly sworn on oath, deposes and says:

That he is a physician and surgeon licensed to practice medicine in the state of California and specializing in the field of neurology and psychiatry. That on the 10th day of April, 1956, affiant examined Mr. Porter Barrett at the request of Henry M. Moffat, counsel for The Atchison, Topeka and Santa Fe Railway Company, and on April 10, 1956, affiant sent to the said Mr. Moffat a report of his examination, findings and conclusions, a copy of which is attached hereto and made a part hereof.

That Mr. Porter Barrett said to affiant during affiant's examination of Mr. Barrett that he is "never without it [the twitching] unless I'm asleep and don't know about it." Mr. Barrett [71] stated further that he knew of nothing that diminished the tendency to the twitching.

/s/ JOHN B. DOYLE, M.D.

Subscribed and sworn to before me this 7th day of September, 1956.

[Seal] /s/ HAL C. KERN, JR.,
Notary Public in and for the Said County and State
of California.

My Commission Expires Dec. 16, 1956. [72]

John B. Doyle, M.D.
1930 Wilshire Boulevard
Los Angeles 57, California

April 10, 1956.

The Atchison, Topeka and Santa Fe Railway Company,
448 Santa Fe Building,
Los Angeles 14, California.

Attention: Henry M. Moffat, Attorney.

Dear Mr. Moffat:

Re: Barrett, Mr. Porter.

The following are my findings in the case of Mr. Porter Barrett, of 2929 Van Buren Place, Los Angeles 7, California, a forty-three year old married man, whom I examined at the office.

Informant:

The patient.

Family History:

The father sixty-eight is living and well. The patient says he does not remember his mother who died as a "very young woman" from unknown causes. Two brothers, forty-eight and thirty-five and three sisters, forty-five, fifty-two and thirty are living and well. There is no other history of familial or nervous or mental disease.

Marital History:

The patient was married at twenty-one or twenty-two years of age. If alive, the first wife is about

forty. At the end of four and a half or five years he and his first wife separated. One son twenty-one or twenty-two is living and well. About thirty-two years of age the patient married a second time. At the end of three years the patient and his wife separated, if alive she is thirty-eight or forty years of age. By another woman the patient has a daughter seven who is living and well.

Previous Diseases and Injuries:

To the best of the patient's knowledge [73] he did not have the usual diseases of childhood. At forty-one he developed mumps on the right side complicated by left orchitis without subsequent atrophy.

About forty-one years of age while working on his automobile a wrench slipped and the patient suffered a laceration of the ulnar aspect of the right hand which required suturing. He lost no time from work due to that injury. He has had no other significant injuries, was born with no deformities.

Former Operations:

Tonsillectomy at twenty-four. Appendectomy for chronic appendicitis at thirty. Suturing of a laceration of the ulnar aspect of the right hand about forty-one years of age.

Habits:

Until five or six years ago the patient drank not to exceed two cups of coffee daily and one cup of tea with lunch. He drinks one quart of milk daily. His appetite has been O.K. He eats two meals a day as a

rule. The bowels move regularly once a day. He sleeps well from 11 or 12 p.m. until about seven o'clock the following morning. Occasionally he takes a nap. He has not suffered from nocturia. He smokes about three-quarters of a pack (15) cigarettes daily. He uses tobacco in no other form. On a week end probably he may "take quite a few" drinks of alcoholic beverage. On some occasions he has been "a little high." He takes no medication regularly.

Previous Residences:

The patient was born January 18, 1912, in Louisiana. For thirty years he has resided in California.

General Historical Survey:

The patient is the third of a family of six. Was rather large for his years during boyhood. He believes he enjoyed average nourishment. Between eighteen and twenty-one he believes that his weight was 130 pounds (undressed). For the past ten years his weight has been approximately 185 pounds (undressed). He is not sure whether his weight has changed during the past year because he has "not weighed."

By fourteen or fifteen he had completed the work of the eighth grade. He was very athletic, played baseball and basketball. He continued to play baseball until twenty-two or twenty-three years of age. Subsequently he took "regular exercise" at the Y.M.C.A. until about the time he gave up playing baseball. Later he enjoyed swimming in the ocean, horseback riding, etc.

Until about five years ago the patient states that he enjoyed very substantial energy and endurance. Since then he has "not been as good" as before. As a rule he has been cheerful [74] and not inclined to worry. He has not been subject to wide swings of mood. He believes that he has been rather sociable. He believes that he has always been able to see "the jolly side of life."

As a small boy the patient lived on a farm. The patient was told that he left the farm while he was "very young." After leaving school the patient was employed at shoe shining. At about twenty-two years of age the patient began working as a waiter. He continues to do that type of work. About fourteen years ago the patient was employed by the dining car service on the Union Pacific Railway. Some four years later he transferred to the Santa Fe. He last worked on December 17, 1955. He last worked on the Super Chief.

About 8:30 or 8:45 p.m., March 11, 1955, while serving dinner on the Super Chief when the patient went into the pantry to get something out of the "chill-box." While stooping another waiter slammed another door of the "chill-box" so that it struck the patient on the top of the head at the vertex. As a result of the blow the patient states that the scalp was lacerated and bled freely. For a few moments the patient states he was "dazed" while he sat on the pantry floor. Ice was applied to the scalp. Later the wound was dressed. Suturing was not required. The patient is not certain whether he did any more work that night. He says "I would say I probably did."

The following day he states his head was "sore" in the region of the vertex. The patient states that the accident took place on the first night of Chicago. He continued to work "all the way into" Los Angeles. At that time he states that his head was not bothering him. As a result he did nothing about it. The patient went out on the Super Chief, on the second evening he states that he had "a few pains in the head" but got along "O.K."

About ten days or two weeks later a scab about the size of a silver dollar was forming on the scalp at the vertex. When he returned to Los Angeles after the appearance of the "scab" he consulted a physician who recommended that the patient be admitted to a hospital to "get bad blood out" of the site of injury. The patient accordingly visited the Santa Fe Hospital, Los Angeles, where nothing was done. The patient was told to consult a physician employed by the Santa Fe on his next trip to Chicago. Accordingly on arrival in Chicago the patient secured an authorization and consulted a physician who advised that the patient be admitted to the Santa Fe Hospital at Topeka, Kansas. An official on the railway in the Commissary in Chicago "denied me this opportunity," the patient says. The patient was referred to another "company doctor in Chicago" who examined him. The commissary also sent the patient to an oculist and a "E.N.T." specialist. The patient was given to understand that everything was "fine," by the "eye doctor." The E.N.T. doctor treated the patient six or eight times during the ensuing six

atrophy, inco-ordination, tremor, fibrillation, diminished acuity of vision or hearing, diplopia, ptosis, tinnitus, O.M.S., disturbance of speech or swallowing or control of the spincters. The patient states he feels fine except in his head, neck and right upper limb. At this time he states that his headache is bothering him "very much." The musculature of the neck is said to be "going like that" (indicating flexion and extension of the fingers of the left hand). The right upper limb is said to be feeling "numb."

Examination:

The patient is a well-developed, well-nourished, middle-aged negro, who at irregular but rather frequent intervals rapidly turns his head to the right and shakes it vigorously. At times he shakes the head without rotating it to the right. On other occasions he blinks his eyelids. He is 68 inches tall, weighs 184½ pounds and manifested blood pressure of 152/108 and a pulse rate of 96 and a temperature of 99.0°F, at 4:50 p.m. Considerable dental restorative work is seen. The tonsils have been removed. There is a short oblique postoperative scar over the right lower quadrant of the abdomen. The spine is straight, shows normal cervical and lumbar lordotic curves in profile view. Stooping with the knees extended the fingertips touch the floor. There is a moderate degree of genu varum. The hands and feet are slightly to moderately moist and cool. There is normal pulsation of both radial, posterior tibial and dorsalis pedis arteries. In other respects the general physical examination including the examinations of

the scalp, skin, buccal and pharyngeal cavities, superficial glands, thyroid, breasts, peripheral arteries, heart, lungs, abdomen, liver, kidney, spleen, inguinal and femoral rings, genitalia, rectum, spine, joints and extremities, is essentially negative.

Neurologic Examination:

The sensation of smell is normal bilaterally. The pupils which are about 3 mm. in diameter are equal and regular and respond promptly to light and in-convergence. The ocular movements are normal; there is no ptosis or nystagmus. To rough tests the visual fields are tubular in outline. The epthalmoscopic examination (in the dark room) is negative.

The patient reads Je.0.75 O.S. and 1.25 O.D. at somewhat extended distance. The watch-tick (usually heard at twenty inches) is heard at six inches with the right ear and at twelve with the left. Air conduction is superior to bone conduction bilaterally. Weber is not referred. Speech is normal.

The patient gags to a very marked degree. Power, tone and speed of the muscles innervated by the remaining cranial nerves and the musculature of the limbs and trunk are normal. Vibratory sensation which is normally perceived over the sternum and the metacarpal bones is slightly diminished over the iliac crests and the malleoli. Sensations of touch, pain, warm, cold, position, passive movement, sterognosis and pressure are normally perceived throughout. The finger-to-nose test is well executed [77] bilaterally, in a rather bizarre manner. The heel-to-

knee tests are well executed on the two sides. There is no tremor, adiadochokinesia, or cervical rigidity. Kernig's and Lasegue's signs are absent.

The corneal reflexes are normal. I am unable to test the pharyngeal reflexes satisfactorily owing the patient's gagging tendencies and grimaces and movements of the head. The sucking and the hard palate reflexes and the jaw-jerk and the palm-chin sign are not obtained. The biceps, triceps and supinator reflexes are normal and equal on the two sides. Hoffmann's sign is absent. The patellar reflexes are slightly diminished. The achilles reflexes are moderately markedly diminished. There is no ankle clonus. The abdominal and cremasteric reflexes are normal. On plantar stimulation the response is flexor in character bilaterally. Chaddock's and allied signs are not obtained.

The gait is normal; the patient walks heel-to-toe satisfactorily, swings his arms freely as he walks. Romberg's sign is absent; there is no truncal ataxia. The station on each foot separately is satisfactory. There are no palpable abnormalities of the ulnar, radial or peroneal nerves nor of the scalp, skull or spine. There is no tenderness on percussion over the head or spine.

Throughout the examination the patient is alert, pleasant, attentive and co-operative but very tense, anxious, hypochondriacal and demonstrative. His speech is coherent and relevant. His sensorium is clear and his memory is good. He has limited insight.

Impression:

The general physical examination reveals a mild hypertensive reaction and slight elevation of the pulse rate and temperature in a well-developed, well-nourished, negro who frequently turns his head rapidly to the right and shakes it, or shakes it without rotating it to the right, blinks and grimaces. The ophthalmoscopic examination is negative. The neurologic examination discloses tubular visual fields which are due to mental rather than physical causes. In other respects the examination is objectively negative. No hypertrophy of the sternocleidomastoid or trapezius muscles is seen.

From these data it would appear that as a result of the accident of February 11, 1955, the patient sustained a contusion of the scalp without losing consciousness. The evolution of his symptoms was gradual and unquestionably was aggravated by resentment toward an official in the Commissary Department of the Railway of Chicago. The clinical picture is not that of spasmodic torticollis but rather of habit spasms. In my opinion Mr. Barrett's symptoms are due entirely to mental causes. In this case settlement of litigation may be expected to be followed by his prompt recovery.

Respectfully submitted,

JOHN B. DOYLE, M.D.

JBD/mbf.

[Endorsed]: Filed September 10, 1956. [78]

In the Superior Court of the State of California
in and for the County of Angeles

No. 84904

THE PEOPLE OF THE STATE OF CALI-
FORNIA

vs.

DARRINGTON WEAVER.

Present: Hon. Thomas L. Ambrose, Judge.

JUDGMENT

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 20 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 21 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 22 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of California, a felony, as charged in Count 23 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this court of the crime of

Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 24 of the information and defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Subornation of Perjury, a felony, as charged in Count 25 of the information and Defendant having admitted prior conviction of a felony as alleged in the information, to wit: Violation of State Poison Act, a felony, convicted in the Superior Court of the State of California, Los Angeles County, upon which judgment was rendered on or about February 13, 1931, and having admitted that he served a term of imprisonment therefor in the State Prison.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison for the term prescribed by law.

It Is Further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State of California at San Quentin.

Done in Open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Perjury, a felony, as charged in Count 26 of the information and Defendant having admitted prior conviction of a felony as alleged in the information, to wit: Violation of State Poison Act, a felony, convicted in the Superior Court of the State of California, Los Angeles County, upon which judgment was rendered on or about February 13, 1931, and having admitted that he served a term of imprisonment therefor in the State Prison.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison for the term prescribed by law, which sentence is ordered to run Concurrently with sentence in Case No. 84904, Count 25.

It Is Further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State of California at San Quention.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 28 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Forgery of Fictitious Name, a felony, as charged in Count 29 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the County Jail of the County of Los Angeles for the term of one year, which sentence is ordered to run Concurrently with State Prison sentences in Case No. 84904, Counts 25 and 26.

It is Further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 7th day of April, 1942.

No. 84905

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 1 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 2 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 3 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count

4 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 5 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 6 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver, having been duly found guilty in this Court of the crime of

Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 7 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

No. 42406

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 1 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law.

The defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 2 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of

California at San Quentin for the term prescribed by law. To run consecutively with sentence in Case No. 42406, Count 1.

The Defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

No. 42407

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 1 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law.

The defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 2 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed

by law. To run Consecutively with sentence in Case No. 42407, Count 1.

The Defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 3 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law. To run consecutively with sentences in Case No. 42407, Counts 1 and 2.

The defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Certified true copies.

[Endorsed]: Filed as of August 16, 1956; February 4, 1957; U.S.D.C.

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S MOTION UNDER
60(b) FEDERAL RULES OF CIVIL PRO-
CEDURE

The defendants' motion to set aside the judgment in favor of plaintiff under 60(b) Federal Rules of

Civil Procedure came on for hearing this 10th day of September, 1956, before the Honorable Wm. F. Byrne, the plaintiff Porter Barrett appearing by his counsel, Erwin P. Werner, the defendant Atchison, Topeka and Santa Fe Railway Company, appearing by its counsel, Louis M. Welsh; the Court being fully advised in the premises and good cause appearing therefor,

It Is Hereby Ordered that the defendant's motion be, and the same is hereby denied.

Dated this 17th day of September, 1956.

/s/ WM. F. BYRNE,

Judge of United States
District Court.

Receipt of copy acknowledged.

Lodged September 11, 1956.

[Endorsed]: Filed September 18, 1956.

Docketed and entered September 18, 1956. [82]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, defendant above named, appeals to the United States Court of Appeals for the Ninth Circuit, from the order denying motion to set aside judgment and motion for relief from judgment, entered in this action on the 18th day of September, 1956.

Dated this 20th day of September, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant.

[Endorsed]: Filed September 20, 1956. [84]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

The points upon which appellant intends to rely on this appeal are as follows:

1. The honorable trial court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by plaintiff's fraud, misrepresentation and other misconduct.

2. The honorable trial court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by other reasons justifying relief from the operation of the judgment.

3. The honorable trial court erred in denying defendant's motion for relief from the judgment upon the grounds stated in said motion.

4. The honorable trial court erred in that it applied the criteria for determining a motion for a new trial rather than [89] the criteria established for determining a motion for relief from judgment under Rule 60(b) Federal Rules of Civil Procedure.

Dated this 27th day of September, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant.

[Endorsed]: Filed September 28, 1956. [90]

United States District Court, Southern District
of California, Central Division

No. 19270—WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

Honorable William M. Byrne, Judge Presiding, and
a Jury.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, May 22, 1956

Appearances:

Attorney for Plaintiff:
ERWIN P. WERNER.

Attorneys for Defendant:

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

* * *

Mr. Werner: Your Honor, I have a Doctor here who I wish to call out of order. He has engagements in the afternoon and he isn't available in the proper sequence.

The Court: You may.

Mr. Werner: Thank you, your Honor.

MORRIS L. GOREN, M.D.

called as a witness herein on behalf of the plaintiff,
being first duly sworn, testified as follows:

The Clerk: Give us your full name, please.

A. Morris L. Goren, M.D.

Direct Examination

By Mr. Werner:

Q. Doctor Goren, will you state your qualifications to the court and to the jury, please?

A. I am a physician and surgeon. I graduated from Northwestern University Medical School in 1936. I have my M.D. degree from there.

I have a specialty in orthopedic surgery, which

(Testimony of Morris L. Goren, M.D.)

requires certification by the American Board of Orthopedic Surgery, which I have. And I am a member of the American Academy of Orthopedic Surgeons, as a specialist in that field.

Q. Thank you. Are you acquainted with the plaintiff, Porter Barrett, Doctor?

A. Yes, sir.

Q. Did you meet him as a patient of yours? [4*]

A. I did.

Q. And what was the date of that first meeting with Porter Barrett?

A. I first saw Mr. Porter Barrett in my office on December 27, 1955.

Q. Did he at that time complain to you of any injury from which he was suffering?

A. He did.

Q. And what did he complain of to you at that time, Doctor?

A. He complained of twitching and tenderness of the head and neck, and a throbbing of the head.

Q. Did you take a history from Mr. Barrett, at that time? A. I did.

Q. Will you state the history as you received it?

A. He stated to me: That while at work as a waiter on the Santa Fe Super Chief railroad train in a bent-over position looking into an ice box, another employee slammed the ice box door on his head, striking the top of his head and cutting the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Morris L. Goren, M.D.)

head. This occurred on March 11th, 1955. No stitches were required. He was knocked to the floor and felt dizzy. He kept on working. Since then he has nervousness and headaches and shakiness of the head.

He was seen by a doctor ten days after his injury, in Chicago. He was given tablets for pain. He worked [5] until December 17th, 1955.

He also has a feeling of cloudiness in his right eye and the muscles in the back of his neck jump and jerk.

He has tenderness on the vertex of his skull and he has to jerk his head without ability to control it.

That was the history I obtained from him.

Q. Now, Doctor, what treatment did you prescribe?

A. I prescribed medication for sedation. I gave him intravenous medication. I gave him physiotherapy and local injections into the spastic tender areas in his neck in order to control his spasm.

Q. What was the nature of the physiotherapy?

A. Heat, electric lights, and neck traction.

Q. And by neck traction, Doctor, will you explain that to the court and the jury?

A. Neck traction consisted of an appliance applied to the head and neck with a pulley and weight attached overhead, to allow the muscles to be stretched and relieve the weight on his nerves which may be pressing and causing the difficulty.

Q. Did that course of treatment start from the time you first saw Mr. Barrett?

(Testimony of Morris L. Goren, M.D.)

A. Yes. I started him on treatment on the next visit. That was December 30th, 1955.

Q. And did those same treatments continue up to the [6] present time? A. Yes, sir.

Q. When did you last see Mr. Barrett?

A. The last visit in my office was on the 16th of May, 1956.

Q. And during the interim, how many times have you seen Porter Barrett and treated him?

A. All together, 28 visits.

Q. What diagnosis did you make?

A. The diagnosis I made was spasmodic torticollis due to trauma.

Q. And by Trauma, do you attribute that to the injury and blow he received on the head——

A. Yes.

Q. ——March 11th? A. Yes, sir.

Q. Have you any idea or opinion as to how long he will have this, these symptoms or this condition?

A. Yes; I do.

Q. How long, Doctor?

A. It may last the rest of his life. It is a chronic condition.

Q. I see. Now, have you brought your doctor bill up to the present time? A. I have. [7]

Mr. Werner: Well, I will introduce that in evidence.

The Court: You may approach the witness, if you care to.

(Testimony of Morris L. Goren, M.D.)

Mr. Werner: Yes, your Honor.

Thank you, Doctor. I will ask that this be introduced in evidence as Plaintiff's Exhibit 1, your Honor.

Mr. Welsh: May I see it?

Mr. Werner: Yes, certainly, Mr. Welsh. Pardon me.

Mr. Welsh: That is perfectly all right.

You don't want all three copies introduced, do you?

Mr. Werner: No. I will even give you one of them.

Mr. Welsh: Well, that is very kind of you.

Mr. Werner: And I will keep one.

The Court: It will be received.

(Said document was received and marked as Plaintiff's Exhibit No. 1 in evidence.)

Q. (By Mr. Werner): And the amount of that bill, Doctor—— A. Was \$335.00.

Q. That is up to including the last treatment?

A. Yes, sir.

Q. Now, tell me what future medical care will be necessary to treat and control this condition of his?

A. He will require continuous observation and care from 2 to 3 times a week in order to give him some form of relaxation of his muscles, and also sedation for his complaints of pain, for many [8] months.

Q. Well, in your opinion, if you have any idea, what would be the cost of the medical care for the next year or year and a half?

(Testimony of Morris L. Goren, M.D.)

A. Approximately five to six hundred dollars a year.

Q. You took X-rays, didn't you, Doctor?

A. I did.

Q. And you have brought them with you?

A. I have.

Q. And I believe they are negative, are they not?

A. They show no fractures or abnormalities in the bony structures.

Mr. Werner: That is all. You may cross-examine.

Cross-Examination

By Mr. Welsh:

Q. Dr. Goren, did Mr. Barrett tell you this accident happened on March 11th?

A. As far as he could recall, that was his date of the accident?

Q. That is what he told you? A. Yes, sir.

Q. And did he also tell you that this twitching in the neck didn't start until about eight weeks later, in May? A. Maybe so; yes, sir.

Q. Do you remember his telling you that?

A. I do not recall correctly the exact time, but it [9] did not start right at that particular time, but it developed gradually.

Q. You made a report to Mr. Werner, after you examined him (the plaintiff) in December, did you not? A. I did.

Q. In that report to Mr. Werner, you didn't mention when the torticollis or twitching of the

(Testimony of Morris L. Goren, M.D.)

neck started, did you? A. No, sir; I did not.

Q. Do you know whether or not—now, I am just asking you for your memory; I know you see a lot of patients, Doctor; I don't want to be exact in asking you to remember something that may be impossible, but can you remember whether or not when you first examined him he told you that it was about eight weeks, or something of that sort, after the blow before his neck began to twitch?

A. During the initial history taken in examination he didn't give me that information.

Q. Now, that letter that you wrote of December 27th, or thereabouts, that was written as a result of your initial examination, wasn't it?

A. Yes, sir.

Q. And at that time he hadn't mentioned that it was about an eight-week period before this twitching started.

Now, normally you would expect this twitching to happen [10] a lot more closely to the accident, wouldn't you? A. No, sir.

Q. You would not?

A. No, sir. It is a gradual process of developing.

Q. As a matter of fact, it is what they call a functional and not an organic thing; isn't that right? A. It may be.

Q. Well, didn't you send Mr. Porter Barrett to a psychiatrist by the name of Dr. Heifetz?

A. I sent him to a neurosurgeon by the name of Dr. Heifetz.

(Testimony of Morris L. Goren, M.D.)

Q. Isn't he a neuropsychiatrist?

A. He is a neurosurgeon.

Q. And did Dr. Heifetz tell you that in his opinion this was a functional overlay?

A. It was his opinion that this man had a fairly severe cerebral concussion, with a functional overlay, with a functional condition of spasmodic torticollis, based upon a marked emotional reaction.

Q. A marked emotional reaction, are those the words? A. Yes, sir.

Q. Now, just for clarity when you speak of a condition being functional, you mean there that there isn't any physical pain of causation, but rather, that it is a fear, [11] apprehension or anxiety on the part of a patient which induces a physical pain; isn't that right?

A. Well, actually we do not know what would bring it on, but we speculate and say that it may be because of that anxiety, tension which has caused him to bring on this condition.

Actually we know that this man did sustain a head injury and following that head injury certain pressures developed, including this spasmodic torticollis.

Whether there is actual lesion in the brain which is causing this excessive mobility of his head and neck or an emotional process which could also cause his condition, we do not know.

Q. When did you first learn from the patient, or anyone else, that the twitching of the neck did not

(Testimony of Morris L. Goren, M.D.)

start until about eight weeks after the blow to the head, if you can remember?

A. Well, further questioning of the patient during my frequent contact with him elicited that history.

Q. Was it when you read Dr. Heifetz's report?

A. I don't believe so.

Q. Now, you Doctors have what are known as subjective symptoms and objective symptoms when you examine a patient; is that right?

A. Yes, sir. [12]

Q. The objective symptoms are things that you as a physician can tell without the aid of the patient, is that generally right? A. Yes.

Q. And your subjective symptom is a communicated symptom, in other words, the patient tells you when he hurts, or something of that sort, am I correct about that? A. That is correct.

Q. Now, Doctor, you gave this plaintiff a complete physical examination, didn't you?

A. I did.

Q. You took X-rays of his skull, is that right?

A. Yes.

Q. And you took X-rays of his neck?

A. I did.

Q. And you took X-rays of his neck both from a side view and a front view, isn't that right?

A. Yes, sir.

Q. You didn't find anything wrong, did you?

(Testimony of Morris L. Goren, M.D.)

A. As far as the bony architecture was concerned, it was within normal limits.

Q. Did you test the sternocleidomastoid muscles and the trapezius muscles? A. I did.

Q. And incidentally, would you please explain to us [13] where those muscles are, sir?

A. The sternocleidal muscles are muscles extending from the sternum, which is the breastbone, and these are the large muscles coming up to the mastoid behind it here. This was the sternocleidomastoid muscle.

The trapezius is a large muscle extending from the base of the skull down to the lower end of the dorsal spine, which is the vertebral column adjacent to the ribs, and also to the shoulder blade. It is a large triangular muscle.

Q. Now, you didn't find anything abnormal about either of those muscles, did you?

A. Yes. He had tenderness over the right sternomastoid incision.

Q. By tenderness, when you felt it he complained of pain, is that right?

A. By palpitation over that region of the right mastoid incision he had tenderness in that region, and there was intermittent spasm, in other words, that muscle goes into a spasmodic state and throws his head in certain peculiar positions, the jerking of the head and neck.

However, by taking the head and neck manually, passively I could bring them into normal mobility

(Testimony of Morris L. Goren, M.D.)

in either direction voluntarily, I mean as far as passively was concerned. [14]

Q. Yes. Well, you didn't find any hypertrophy or swelling or enlargement of either of those muscles, did you?

A. I wouldn't say that I found any marked, any marked hypertrophy to see.

Q. And when you do not use a muscle, it withers and becomes atrophied or smaller, isn't that right?

A. Yes.

Q. And when you use one more than normally, it swells and becomes enlarged or hypertrophied, isn't that right?

A. I wouldn't say when it swells. When we talk about swelling, we mean a disease.

Q. I am using that as a lay expression, meaning that it enlarges.

A. Well, if the muscle is used excessively, this man is going to develop eventually an enlargement of that particular muscle.

Q. Well, these two muscles we have been talking about, the one that goes from the mastoid down to the breast bone and that triangular muscle you described of the shoulder, where you have a twitch or a torticollis, that shows up fairly quickly, in other words, you find the enlargement fairly quickly if the torticollis develops?

A. I wouldn't say that. It takes time for any muscle to develop.

Q. If it would develop, it would certainly develop within [15] six months, wouldn't it?

A. It may.

(Testimony of Morris L. Goren, M.D.)

Q. And you didn't find any, did you?

A. I didn't notice it.

Q. No. And you knew that from May, 1955, to December, 1955, he had complained of having this twitching, isn't that right? A. Yes.

Q. All right. Using these tests, objective tests we have been talking about, then you can tell by feeling with your hand if the muscle did become larger or smaller, can't you?

A. Well, but one must remember that the movement of the head is a contracted process and he jerks his head one way——

Q. All right, Doctor, I asked you a question. Well, all right. This was one of those objective tests?

A. Yes; but in order to explain, I would like to elaborate.

Q. You may explain, Doctor. It is an objective test? A. Yes.

Q. All right; go ahead and explain.

A. In order to evaluate enlargement, one must cut out or stop movement to the outside, but in his case, in order to bring his head to the normal position he was also using [16] the other muscle, so that they are both of the same size, so we cannot say that one is larger than the other.

Q. At any rate, you didn't find any?

A. No, sir.

Mr. Welsh: All right, Doctor, thank you very much.

(Testimony of Morris L. Goren, M.D.)

Q. You have no history of unconsciousness after this blow, do you, Doctor?

A. He was light-headed, but he was not unconscious.

Q. Did he tell you that he worked from March, 1955, when this occurred, through December of 1955?

A. Yes, sir.

Q. And did he also tell you that he saw no physicians at all between May of 1955 and December of 1955, when he came to see you?

A. I have no history to that effect.

Q. He didn't say one way or the other?

A. No, sir.

The Court: We will take a short recess.

Ladies and gentlemen of the jury: During the recess period, don't discuss this case amongst yourselves or with anyone else and don't form or express any opinion until the case has been finally submitted to you. We will recess for about five minutes.

(Recess.)

The Court: May it be stipulated that all the members of [17] the jury are seated in the box?

Mr. Welsh: It is so stipulated, your Honor.

Mr. Werner: Yes, sir.

You may proceed, Mr. Welsh.

Q. (By Mr. Welsh): Dr. Goren, do you have a copy of Dr. Heifetz's report to you?

A. I do.

Q. Will you kindly turn to the second page of it and under "Tentative Diagnosis:" paragraph 2,

(Testimony of Morris L. Goren, M.D.)

does Dr. Heifetz state, "Spasmodic torticollis, etiology, severe anxiety reaction"? A. Yes.

Q. Taking that sentence part by part, "spasmodic" means this tic in the neck that we can see, of Mr. Barrett, isn't that right? A. Yes.

Q. An etiology, what does that mean?

A. The origin of which.

Q. All right. So that it means that the origin of the tic in the neck is a severe anxiety reaction, is that what the sentence means?

A. Severe. Yes.

Q. Now, Mr. Barrett was referred to you by Mr. Werner, his counsel, was he not?

A. No, sir. He was referred to my office by [18] Dr. Darrington Weaver.

Mr. Welsh: By Dr. Weaver.

Thank you. No further questions.

Mr. Werner: No further questions. Thank you, Doctor.

May the Doctor be excused?

Mr. Welsh: Yes. The Doctor may be excused.

The Court: Yes.

Mr. Werner: Thank you, Doctor, very much.

Mr. Porter Barrett, take the stand.

PORTER BARRETT

the plaintiff herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

The Clerk: Give us your full name?

A. Porter Barrett.

Direct Examination

By Mr. Werner:

Here is the original deposition, your Honor. I would like to file it with the Clerk.

The Court: All right; you may file it.

Mr. Welsh: May I inquire, your Honor: Three depositions were taken in Chicago. I wonder if they have arrived and are filed with the Clerk?

The Clerk: Yes.

Mr. Welsh: Thank you.

Q. (By Mr. Werner): You are the plaintiff in this action? A. Yes. [19]

Q. And where do you reside, Mr. Barrett?

A. 7441½ East 32nd Street.

Q. What is your business or occupation?

A. A waiter.

Q. And by whom were you last employed?

A. The Santa Fe Railway.

Q. And what was the date of your first employment there? A. In May, 1946.

Q. And at the time you were employed, were you given a physical examination? A. Yes.

Q. Before you were accepted? A. Yes.

Q. What? A. Yes, sir.

Q. And what was the condition of your health

(Testimony of Porter Barrett.)

at that time? A. Good.

Q. What is your age? A. 43.

Q. Have you worked continuously for the Santa Fe railroad from the time you were first employed in 1946 until we will say December 17th, 1955?

A. Yes.

Q. On the occasion in question here, what train were you [20] working on?

A. The Super Chief.

Q. And in which direction were you proceeding on this occasion? A. Westbound.

Q. And you have alleged in your complaint that you were struck on the head on March 11th. At or near, if you know, what station or town did this occur?

A. Somewhere just west of Joliet, Illinois.

Q. About what time of day or night?

A. It was around 8:45 or 9:00 o'clock at night.

Q. Well, where did it happen in this dining car?

A. It happened in the pantry.

Q. And in respect to what object there? I mean what were you using at the time that it occurred?

A. I was in a stooped-over position looking in——

Q. Well, I know.

The Witness: I don't think I understand.

Q. (By Mr. Werner): Was it an ice box or a chill box? A. Oh, a chill box.

Q. How? A. A chill box.

Q. And describe the chill box to the court and to the jury, to the best of your ability.

A. The chill box is, oh, approximately 3, 3½

(Testimony of Porter Barrett.)

feet [21] high, about 3 feet wide and 6 or 7 feet long.

Q. And has it doors on it?

A. Yes; it has two doors.

Q. And state whether the doors close to the middle or open from the middle.

A. They close to the middle. They open——

Q. And they were hinged on each end of the chill box?

A. Yes.

Q. And what space was there between them when the chill box was closed—is closed?

A. It is a very small piece of metal.

Q. No. I mean in respect to inches, what space was there between the two doors, if you remember?

A. Oh, approximately an inch.

Q. What is the material on these doors made of, if you know?

A. Kind of heavy aluminum doors, or something like that, metal I guess you would call it; metal.

Q. Well, you mean representing certain stainless steel; did that appear to be stainless steel?

A. Yes, they could have been; yes.

Q. I just want your description for the court and jury is all.

A. Yes.

Q. Were you waiting on some customers at that time? [22]

A. Yes.

Q. And had you gone to the chill box to obtain some object or material?

A. Yes.

Q. Now, what position were you in?

A. I were in a stooped-over position.

Q. And which side of the box were you using?

(Testimony of Porter Barrett.)

A. The lefthand side.

Q. You were using the lefthand side?

A. That is right, sir.

Q. And just tell us in your own words just what happened?

A. Well, while I was in this stooped-over position, the object I was looking for, I don't remember what it was, my face was facing east then, my back was to the west and this other waiter came up to get something which I don't remember what he were looking for, then, during the present; at the time he finished, before I did, and he just slammed the door which struck the center of my head.

Q. What happened to you?

A. I was dazed for a few minutes, sitting in the middle of the pantry floor.

Q. Did your head bleed? A. Yes, sir.

Q. Did you suffer pain at that time?

A. Oh, yes. [23]

Q. Where?

A. In my head, my neck, had throbbing of the eye and watering of the eye.

Q. Was it at that time you had the pain in your eye?

A. Well, I wouldn't say it started right that particular night. It started later on.

Q. Well, state what happened. Did your head bleed? A. Yes, sir.

Q. And which portion or which part of the head was struck?

(Testimony of Porter Barrett.)

A. The very center of my head, I guess you call it.

Q. Well, point to the portion.

A. (The witness indicates.)

Mr. Werner: I think the witness is pointing to the knoll——

The Witness: To the knoll of my head, I guess you call it (indicating)—the center of it.

Mr. Werner: The center of his skull.

Q. Your head, how much did it bleed, if you can remember?

A. Well, it bleed for quite a while.

Q. And did any of the other waiters help you to staunch the flow of blood? A. Yes.

Q. And was it necessary for you to change your costume or your coat? A. Yes, sir.

Q. And did you finish waiting on the table that you had [24] begun to wait on that evening?

A. No, I didn't.

Q. But later that evening I believe you finished the night's work, is that correct?

A. Right, sir.

Q. And now tell me, when was the first time that you went to see a doctor?

A. During the month of April I saw a doctor.

Q. And what was his name?

A. Dr. Bernard Jacobs.

Q. Did he treat you?

A. He examined my head.

Q. Well, he examined your head, but did he treat you? A. No; no, sir.

(Testimony of Porter Barrett.)

Q. What did he advise you to do?

A. He advised me to go to my own company doctor.

Q. All right; and did you go to your own company doctor? A. Yes.

Q. And was that at the Santa Fe Hospital here in Los Angeles? A. Yes.

Q. Do you remember whether you were examined by a doctor, at that time? A. Yes. [25]

Q. Did you complain to him about any pain that you were suffering? A. Yes.

Q. What did you complain to him about?

Mr. Welsh: Well, I object to that, your Honor. What he complained about is not evidence. He can tell what his condition was, but it would be just a self-serving statement to say what he said to someone else.

The Court: Overruled.

Mr. Werner: All right. Answer the question, Mr. Barrett.

A. Oh, I complained to him I had severe headaches, my eye was throbbing, watery, and my neck was very stiff.

Q. All right. Did your head ache at that time?

A. Severe headaches, yes, sir.

Q. And your neck hurt you? A. Yes.

Q. And your eye throbbing? A. Yes.

Mr. Welsh: What Doctor?

Mr. Werner: The Santa Fe Doctor. I don't think he knows his name, but that is in the deposition.

Mr. Welsh: Pardon me. I would request that the

(Testimony of Porter Barrett.)

evidence be stricken as not having laid a proper foundation, unless the witness is asked the name of the physician to whom he allegedly made those statements. [26]

Mr. Werner: All right. I will back up and——

The Court: I understood him to testify that it was a Doctor in the Santa Fe Hospital.

Mr. Werner: Yes, he did.

The Court: You may inquire to see whether or not he knows the Doctor's name.

Mr. Werner: I don't think he remembers the name.

Q. Do you remember the name of the Doctor that examined you at the Santa Fe Hospital?

A. I do not.

Q. And did he advise you what to do, at that time? A. Yes.

Q. What did he advise you to do?

A. On my return trip to Chicago to see a Doctor when I got there.

Q. All right. And did you do that?

A. Yes.

Q. Now, when you got to Chicago, how many Doctors did you see?

A. I believe I saw four Doctors, I believe, sir.

Q. Do you know—do you remember who the first Doctor was that you saw? A. Dr. Matthews.

Q. And is he a Santa Fe Doctor?

A. Yes, sir. [27]

Q. And do you remember the date that you saw him?

(Testimony of Porter Barrett.)

A. The 22nd of April, I believe it was, sir.

Q. Were you suffering at that time from any pain? A. Yes.

Q. Where?

A. Headaches, throbbing of my eyes, watering, and my neck was stiff.

Q. Did you complain of those things to Dr. Matthews? A. Yes.

Q. Did Dr. Matthews recommend any treatment at that time? A. Yes.

Q. What, if you know?

Mr. Welsh: Your Honor, I object to that as purely hearsay. We have the deposition of Dr. Matthews. It was taken upon stipulation of the parties. What Dr. Matthews told him would be purely hearsay as far as this defendant is concerned.

The Court: The objection is overruled. He may testify to it.

Mr. Werner: I have here—did Dr. Matthews give you——

The Clerk: Do you want that marked?

Mr. Werner: I haven't introduced it in evidence. I am going to——

The Clerk: Just mark it?

Mr. Werner: Oh, yes.

The Clerk: Plaintiff's Exhibit 2 for identification. [28]

(Document marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Werner): I have here what pur-

(Testimony of Porter Barrett.)

ports to be an order of Dr. Matthews. I will ask you to examine that. Have you ever seen that before?

A. Yes.

Q. And what is it?

A. It is an order from Dr. Matthews for me to be admitted into Topeka Hospital, railroad hospital in Topeka, Kansas.

Mr. Welsh: The document will speak for itself, your Honor.

The Court: Are you going to put the document in evidence?

Mr. Werner: Yes, I want to introduce the document.

The Court: Very well. It speaks for itself.

Mr. Werner: Yes, your Honor.

The Court: Have you offered it in evidence?

Mr. Werner: I am offering it in evidence now as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 2.

Mr. Werner: ——2.

The Court: All right. It will be received.

(Said document was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Mr. Werner: Now I would like to read this to the jury, [29] your Honor, in order to make my subsequent questions intelligible.

The Court: All right. You may read it.

Mr. Werner: This is:

(Testimony of Porter Barrett.)

“Santa Fe Hospital Association

Recommendation for Admission to Hospital

Surgeon in charge of A. T. & S. F. Hospital:

The bearer, Porter Barrett, employed as a waiter, is a member of the A. T. & S. F. Hospital Association, and in need of Hospital care. He has been ordered to me for examination by W. H. Ford. His residence is 6014 So. Parkway. His last employment commenced 5-8-46. He is now suffering from cephalgia and tenderness of scalp caused by contusion of scalp.

HENRY B. MATTHEWS,
Surgeon.

Chicago, Ill., Date: 4-22-55.

Referred for X-ray of Skull only.”

Q. (By Mr. Werner): Now, as a result of this, did you go to the hospital in Topeka, Kansas?

A. No.

Q. Why didn't you go, after the recommendation of Dr. Matthews? [30]

A. I was told to go to see some other Doctor, that it wasn't necessary for me to go to Topeka, by this Mr. Ford.

Q. And who told you not to do that?

A. This Mr. Ford.

Q. What was his position for the Santa Fe Railway?

A. I don't truthfully know. He has an office

(Testimony of Porter Barrett.)

there in Chicago, but I do not know his truthful position.

Q. All right. Did you only see Dr. Matthews once? A. Yes, sir.

Q. Who was the next Doctor that you went to see, if any, in Chicago?

A. I saw a Dr. Buttice.

Q. And is he a physician employed by the Atchison, Topeka and Santa Fe? A. Yes, sir.

Q. And do you remember the approximate date that you went to see him? A. No.

Q. Well, was it during the month of April, '55?

A. Yes; it could have been, yes.

Q. Just, Mr. Barrett, give your best recollection of these things. A. Yes; it was April.

Q. If you don't remember the exact date, just state what you remember, approximately. [31]

A. It was in the month of April.

Q. Did Dr. Buttice examine you? A. Yes.

Q. And were you suffering any pain at the time you went to see him? A. Yes.

Q. Where?

A. In my head, terrific headaches; my neck was very stiff at that time and my eye was throbbing and watering.

Q. And did you complain of those things to Dr. Buttice? A. Yes.

Q. How many times did you see Dr. Buttice?

A. Only once, sir.

Q. What did he do for you, if anything?

(Testimony of Porter Barrett.)

A. He examined me and taken X-rays of my head.

Q. Did he give you any treatment?

A. No, sir.

Q. Nothing for your headaches?

A. No, sir.

Q. Nothing for your neck? A. No, sir.

Q. Did you go to another Santa Fe doctor?

A. I did.

Q. Do you know his name?

A. No, I don't. [32]

Q. Do you know where his office is?

A. 105 South LaSalle.

Q. Did this Doctor examine you?

A. He treated me for—I wouldn't say examined me, no.

Q. Well, did you complain to him about the condition of your head and your neck and your eye?

A. Yes, sir.

Q. And did he give you any treatment?

A. Yes.

Q. What did he do for you, if anything?

A. He cleaned my ears out and give me some kind of——

Q. Were you suffering——

A. I didn't hear you?

Q. ——from anything wrong with your ear?

A. No, no.

Q. You complained of your head and your neck and your eye, is that correct?

A. That is right.

(Testimony of Porter Barrett.)

Q. And what else did he do for you, if anything?

A. He gave me treatments for my nose.

Q. And did you complain of anything being wrong with your nose? A. No, sir.

Q. And how many times did you see this Doctor?

A. 4 or 5 times. [33]

Q. Did you see any other Doctor in Chicago?

A. Yes.

Q. Well, do you know his name? A. No.

Q. Do you know where his office is?

A. It's 100 South, 104, something like that, South Michigan——

Mr. Werner: I see.

The Witness: I am not positive.

Q. (By Mr. Werner): Was he a specialist of any kind? A. He was an eye Doctor.

Q. An eye Doctor. Was that Dr. Ackerman?

A. It could be.

Q. And were you suffering from any disability or pain at the time you went to see him?

A. My eye; my head was—still had the terrific headaches; my eye was throbbing and watering and my neck was stiff.

Q. All right. What did he do for you, if anything? A. He examined my eye.

Q. And did he prescribe any treatment for your eye? A. No, sir.

Q. And what did you complain to him about, if anything?

A. That I had terrific headaches and with water

(Testimony of Porter Barrett.)

in my eye and the throbbing of my eye and that my neck was stiff. [34]

Q. All right. Do you remember the approximate date of this examination by the eye Doctor?

A. I believe it was May the 3rd or 5th, somewhere along in there.

Q. Did he prescribe any treatment for you?

A. I don't remember now.

Q. What?

A. I don't remember; no, he didn't.

Q. Now, when was the first time—I notice the jerking of your neck—when did you first notice this jerking of your neck and head?

A. Oh, the last of May or the first of June, somewhere along in there, I believe it was.

Q. And has that continued since that date?

A. Yes.

Q. And has it improved, gotten better or worse?

A. No; it hasn't.

Q. And finally, did you go to see your own Doctor again after having seen these numerous Santa Fe physicians? A. Yes, I did.

Q. All right. When was the next time you went to see your own Doctor? A. It was December.

Q. And who did you see at that time?

A. Dr. Jacobs, Dr. Bernard Jacobs. [35]

Q. Did he treat you? A. No.

Q. Prescribe any treatment for you?

A. He prescribed that I should see my own physician—Company doctor again; that is what he prescribed.

(Testimony of Porter Barrett.)

Q. All right. Whom next did you see then?

A. Dr. Weaver

Q. And did he treat you? A. No.

Q. Did he recommend you see another physician?

A. Yes, he did.

Q. And did he recommend Dr. Morris Goren?

A. Yes.

Q. And what date did you go to see Dr. Morris Goren? A. December 27th.

Q. 1955? A. Yes.

Q. Were you suffering any pain at that time?

A. Yes, sir.

Q. Where?

A. Headaches; my eye was throbbing, watering, and my neck was jerking like it is now.

Q. And did you complain to Dr. Goren about those things? A. Yes.

Q. Did he examine you at that time? [36]

A. Yes.

Q. Did he prescribe any course of treatment for these things from which you were suffering?

A. Yes.

Q. Well, tell the jury in your own words what he did for you, the best you can remember.

The Court: Hasn't the Doctor testified to all of that?

Mr. Werner: Well, all right. I would just as soon not cover it with him.

The Court: Unless you are trying to impeach the Doctor.

Mr. Werner: No; I am not. That is all right.

(Testimony of Porter Barrett.)

Your Honor, in respect to the earnings I think we have agreed on the amount of wages earned. Will the Court instruct the jury on that? I don't want to cover any ground unnecessarily.

The Court: Yes. I think that is in the Pretrial Order.

Mr. Welsh: It is in the Pretrial Order.

Mr. Werner: It is in the Pretrial Order.

The Court: Then, you can submit an instruction on that. You can submit an instruction on that.

Mr. Werner: Thank you, your Honor.

I think you may cross-examine.

Cross-Examination

By Mr. Welsh:

Q. Mr. Barrett, you are still employed by the Santa Fe, are you not? [37] A. Yes.

Q. You are on leave of absence, is that correct? A. Yes.

Q. You still hold your same seniority in the Dining Car Department, do you not, sir?

A. Yes; I think so.

Mr. Welsh: Yes. Now, I have here some photographs that purport to be photographs of ice box. Pardon my back.

Mr. Werner: As long as you state that is the ice box, I have no objections, Mr. Welsh.

Mr. Welsh: I will ask Mr. Barrett.

Would you like to mark these, first; or shall I just have them identified?

(Testimony of Porter Barrett.)

The Court: You better have them marked for identification.

The Clerk: Defendant's Exhibits A, B and C.

(Said photographs were marked as Defendant's Exhibits A, B and C, for identification.)

Mr. Welsh: Thank you.

Q. Mr. Barrett, I show you a photograph designated as Defendant's Exhibit A, which purports to be a picture of the chill box in an open position. Does that look like the chill box that was involved in this accident? A. No. It doesn't.

The Court: Keep your voice up. [38]

The Witness: No.

Q. (By Mr. Welsh): Why doesn't it?

A. It doesn't look like a Super Chief chill box. It is not a Super Chief chill box.

Q. Well, I will ask you if you will look at that closely and see if that isn't the chill box on Car 601, the car you were on when you were injured?

A. Oh, I couldn't say that. No; I don't know whether that would be on 601, you know, I couldn't say what it was.

Q. And it doesn't look like the one you got konked on the head with? A. No; it doesn't.

Q. I show you Defendant's Exhibit B for identification, and ask you if that is a fair representation of the chill box that was involved in this accident? A. No. No; it doesn't.

Q. Can you please point out what the differences

(Testimony of Porter Barrett.)

are between the ones shown on photographs A and B, and the one that was involved in the accident?

A. Well, the only difference that I can see here, that the strip here is much larger than they are on the Super Chief diners and the floor is different here from what they use or that you walked on, and the doors are much larger here.

Q. The what, the doors are larger? [39]

A. Yes, and this metal strip is much larger

Q. All right. Can you tell what position of the pantry that chill box is in from the photograph; are you able to tell that?

A. Yes, it is on the right-hand side of the pantry as you go in.

Q. Is that the same side the chill box was on, where you got injured? A. Yes, sir.

Q. All right. Now, forget about the floor mat, because the floor mat hasn't anything to do with the chill box.

Is that chill box the same except for the fact that you say there is a wider space in between?

A. Yes.

Q. And you say the door is longer, is that right?

A. Much longer, yes.

Q. All right. Let me show you Exhibit C and ask you if that looks like the chill box which was involved in this accident? A. No, sir.

Q. Why doesn't Exhibit C reflect the true picture of the chill box which was involved in this accident?

A. Because they are just like the first two that

(Testimony of Porter Barrett.)

I have looked at here; they are very much different. They are all the same, in other words, to me they are all the [40] same box.

Q. Well, that is true, they are all the same box.

When was the last time that you have seen the chill box that was involved in this accident?

A. I haven't seen it since December 17th, 1955.

Q. So you are judging from your recollection since December, is that right?

A. That is right, sir.

Q. How many different dining cars did you use on this Super Chief run, one or two, or how many on these different runs?

A. They had one standard car that they use, so far as I know.

Q. They have just one car on each piece of equipment, is that right; one dining car?

A. Yes, sir.

Q. Was the same dining car used on every piece of equipment, in other words, every train that went out of Chicago or went out of Los Angeles didn't have the same dining car on it, did it?

A. I don't think I understand what you mean?

Q. Well, you were on this run regularly, on the Super Chief, is that right?

A. That is right.

Q. You would leave Chicago, come to Los Angeles, and turn [41] around and then go back to Chicago and you would lay over in Chicago for a few days, is that right?

A. That is right.

Q. And then you would take another train out?

A. Yes, that is right.

(Testimony of Porter Barrett.)

Q. Did you always have the same car that you rode on or were there different dining cars on the Super Chief?

A. When our turn would come, we would take a different dining car, yes.

Q. Well, do you know the numbers of the cars, the car numbers of the dining cars that are used on the cars that you were on?

A. That run were six hundred series, 601, '2, '3, '4, '5, '6, something like that.

Q. All right. Were the chill boxes on those cars different ones from the other insofar as their dimensions were concerned, or were they all the same?

A. Yes, they are more modern type of cars. Yes, they were different from the older type dining cars; yes.

Q. Well, there are some chill boxes on some of those cars that are more modern than the ones shown on these photographs, is that right?

A. Yes, sir; that is right.

Q. The kind you were injured on, was it the more modern type, or was it the general type designated by these [42] photographs?

A. More modern type.

Q. Yours were more modern? A. Yes.

Q. And you don't know what car you were on at the time?

A. No. I was on the 600's. It was in the 600 series, but I don't know what car it was on.

Q. Well, if I may just put these on the witness stand there, your Honor. I would like you to examine these three photographs and tell me in what

(Testimony of Porter Barrett.)

way the one you were injured on was more modern than that? What was more modern about it?

A. Well, there isn't enough of this picture to picture the different modern size of the pantry, because I only see two doors.

Q. How many doors are there on a chill box?

A. There are only two swinging doors and it has doors on top also—lids, lids.

Q. Well, can you tell from looking at that whether it is or it is not a more modern type?

A. Yes. This was not a modern type.

Q. Tell me, what makes you say that? What is there that you see there that you wouldn't expect to find?

A. Well, it is the doors and the box itself.

Q. Tell me, what does the more modern one look like? [43]

A. I believe the doors are shorter. I can say that I believe the ridges between the doors are smaller.

Q. And that is the difference between this type and the more modern type, is that right?

A. As near as I can remember, yes.

Q. Have you ridden on all of these different runs, 601, '2, '3 and '4?

A. I won't say that I have caught them all, no.

Q. Have you caught most of them?

A. I would say yes.

Q. You have?

A. I would say I have caught about half of them, I guess, something like that.

(Testimony of Porter Barrett.)

Q. On any of the runs that you ever ran, did you ever see a door—chill box like this one?

A. Yes.

Q. You have? A. Yes.

Q. On the Super Chief? A. No.

Q. Never on the Super Chief? A. No.

Mr. Welsh: All right. Now, these photographs will be available if you want to look at them during recess. May I get the photographs, your Honor. [44]

(Mr. Welsh removes photographs from the witness table.)

The Court: We will recess.

Ladies and gentlemen of the jury: During the recess period, keep in mind the admonition heretofore given. Do not discuss the case or form an opinion until the case is finally submitted to you.

We will recess until 2:00 p.m.

(A recess was taken until 2:00 p.m., of the same day, Tuesday, May 22, 1956.) [45]

* * *

PORTER BARRETT

the plaintiff herein, having been previously duly sworn, resumed the witness chair, and testified further, as follows:

Cross-Examination

(Continued)

By Mr. Welsh:

Q. Mr. Barrett, did you have a chance to look at the photographs after the court recessed at noon?

A. Yes, sir.

Q. Do you wish to change your testimony in any way concerning them, or are you satisfied to leave it stand as is?

A. No. I will say that they are pictures of a dining car.

Q. I will show them to you, again, Mr. Barrett——

May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Welsh, continuing): ——Exhibits A, B and C for identification, Mr. Barrett, and state your opinion, now, after having more calmly reflected and looked at the pictures, that they do or do not fairly represent the chill box where your accident occurred? [47] A. Yes.

Mr. Welsh: They do. I would like to offer them into evidence at this time.

The Court: They will be received.

(Said photographs were received in evidence as Defendant's Exhibits A, B and C.)

(Testimony of Porter Barrett.)

Mr. Welsh: May I have the privilege of passing them to the jury, sir?

The Court: Yes.

Mr. Welsh: Thank you.

The Court: The bailiff will take them over and pass one down the front row and one down the back row.

Mr. Welsh: May I have Exhibit 2, please, Mr. Clerk? Thank you. May I approach the witness?

The Court: Yes.

Q. (By Mr. Welsh): I call your attention, Mr. Barrett, to Exhibit 2, the release from Dr. Henry B. Matthews and call your attention that down at the left-hand corner it says you are "Referred for X-ray of Skull only," that is, referred to the hospital for an X-ray of skull only. Was that on it at the time Dr. Matthews gave it to you?

A. Yes.

Q. It was, and did Dr. Matthews tell you he was referring you to the Topeka Hospital for the skull X-ray only? [48]

A. Yes.

Q. Now, you testified that you didn't go to the Topeka Hospital, but did you have X-rays taken of your skull?

A. Yes.

Q. In Chicago?

A. Yes.

Q. By a physician?

A. Yes.

Q. And you were informed, I suppose, in the course of events, of the results of those X-rays, were you?

A. No; I wasn't.

Q. You were not?

A. No, sir.

Q. You were informed of the results of X-rays

(Testimony of Porter Barrett.)

taken by doctors, taken here in Los Angeles, later, is that right? A. No.

Q. Dr. Goren didn't tell you what the results of his X-rays showed? A. No.

Q. Now, do I understand correctly that the first doctor that you saw was about April 17th, 1955?

A. I would say yes, along that, 17th or 18th, 19th, somewhere along there.

Q. And where was that, Mr. Barrett?

A. Here in Los Angeles. [49]

Q. Now, then, your accident happened on the 11th of March, so that would mean, I assume, that you arrived in Los Angeles on the Super Chief on March 13th, is that correct? A. Yes, yes.

Q. And then did you leave again on the 14th to return to Chicago? A. Yes.

Q. And you would have arrived in Chicago on the 16th of March, is that correct?

A. Yes; that is correct.

Q. And you would have laid over in Chicago about four days and then made another trip out to the Coast. Did you do that? A. Yes.

Q. In other words, you followed your regular routine from March 11th and then on April 17th, when you were again in Los Angeles, which would have been about the third trip, you went to see the Santa Fe doctors in Los Angeles, is that right?

A. Yes.

Q. They suggested that you go to Chicago and see the doctors there, right?

A. Yes; that is right. [50]

(Testimony of Porter Barrett.)

Q. Now, you are hired out of Chicago, are you not, sir?

A. No. I was transferred from here to Chicago. I were hired——

Q. Well, before March 11th, you were transferred? A. Yes.

Q. Well, that is right. As of the date that the accident occurred, you were employed out of the Chicago office, is that correct? A. Yes.

Q. And you belong to the Hospital Association in that area, in the Chicago area, am I correct about that? A. I would say you are, sir, yes.

Q. I didn't hear you. A. Yes.

Q. Yes, and so you were referred back to those doctors back in that area, am I correct?

A. Yes.

Q. Would you like a little rest?

A. No. You can continue. I have a terrific headache, but that is quite all right.

Mr. Welsh: I don't want to—I just want you to know if at any time you would like a rest, please let the court know.

Now, I would like to make a sketch. Your Honor, may I use the blackboard? [51]

The Court: Yes.

Mr. Welsh: Can your Honor see it?

The Court: That is all right.

Mr. Welsh: If the court and counsel have no objection, I will put on a little diagram of the car,

(Testimony of Porter Barrett.)

myself, but if you prefer I will have the witness do it.

Mr. Werner: I have no objection at all. I imagine you can do it very well, too.

Mr. Welsh: No, I am not an artist. I thought it would save the witness coming down here.

Mr. Werner: All right. That is fine.

(Mr. Welsh draws diagram on the black-board.)

Q. (By Mr. Welsh): Can you see this, Mr. Barrett? A. Yes.

Q. Now, you will remember that I am not much of an artist and this is not to scale, but this is meant to represent a dining car. The squares at the bottom are the tables at which the people sit. At this space here on which I will put a "1" is the vestibule; and this long, narrow corridor is the corridor people walk down in order to get to the tables; and then in the square, this is meant to be the kitchen (Mr. Welsh writes "Kitchen" in said square); and the lower portion the pantry (Mr. Welsh wrote the word "Pantry" in said portion of the blackboard sketch). Excuse my inartistic endeavor. Do you recognize that as the [52] general layout of the dining car that you were serving on when this accident occurred? A. Yes; it is something similar, yes.

Q. Could you come here and correct it?

Mr. Werner: Oh, I think that is silly.

Mr. Welsh: I confess that I am merely attempt-

(Testimony of Porter Barrett.)

ing to do it from my general knowledge, and if there is something you can come and help me with, I will appreciate your doing it.

The Witness: Well, you do what you have your way, but I don't know that I could do any better.

Q. (By Mr. Welsh): All right. Could you tell me this: Could you either come down and place it here, or tell me where to place the chill box that was the center of this accident?

A. Well, take the pantry there, the chill box would be over on your right-hand corner from wall to wall.

Q. Right here (indicating).

A. From wall to wall there.

Q. Right here (indicating)? Is that correct?

A. Yes.

Q. Now, above the chill box, forming the top of the chill box is sort of a work space, is that right?

A. That is right.

Q. So that the chill box doors would be underneath [53] that top surface, is that correct?

A. That is correct.

Q. All right, sir. Fine. What is it that divides the kitchen from the pantry?

A. It is the steam table and work bench.

Q. The steam table and work bench?

A. From the pantry side, yes—the kitchen side.

Q. And you picked up the orders from the steam table?

A. From the inside of the pantry there is a work bench which we pick up from, yes.

(Testimony of Porter Barrett.)

Q. What?

A. There is a work bench there, we call it, where you pick up from the kitchen.

Q. You can pass through from the kitchen into——

A. No, no.

Q. You can't? A. No, no.

Q. How do the cooks get the food from the kitchen out onto the steam table?

A. There is a high ledge up there where to put, set your food up there on the ledge, and you just reach up and get it.

Q. The cooks put the food up on the ledge?

A. Yes.

Q. Then the waiters pick it up from the ledge?

A. Yes. [54]

Q. About this high (indicating)?

A. No. It isn't that high. It is about to here (indicating), I guess.

Q. Then, you can look from the ledge into the pantry?

A. Yes.

Q. Then I just want to get the general orientation. As I recall, you went in and opened up one of the doors on this chill box, am I correct about that——

A. Yes.

Q. ——with two doors, as the photographs show?

A. Yes.

And you opened up one of them? A. Yes.

Q. Do you remember, at this time, what you were looking for?

A. No, I don't.

Q. While you were looking in there, in the chill

(Testimony of Porter Barrett.)

box, do you recall that another waiter came around on the other side and opened up the other chill box door? Do you, sir? A. Yes.

Q. And you were aware of the fact that this other waiter stooped down and took something out of his side of the chill box, were you not, sir?

A. I don't remember it, sir.

Q. Well, you knew that the door was opened by another [55] waiter, the other door?

A. No, I don't recall him even being there at all.

Q. I am sorry. I didn't hear you.

A. I say, I don't recall him being there.

Q. Let us go back now; and I don't want you to be confused. You went in and opened up—There are two doors on this chill box, aren't there?

A. Yes.

Q. You opened up one of the doors and you were looking for something and you can't remember what, now? A. No.

Q. But you were looking for something?

A. Yes.

Q. Now, you remember while you were looking that another waiter came and opened up the other door; do you remember that?

A. I don't recall him even being there at all, when I was looking in there; no.

Q. When did you first remember that he was there?

A. After I was struck on the head and kind of got myself back together, I recall that somebody

(Testimony of Porter Barrett.)

said somebody slammed the door on my head. I don't know actually who was there.

Q. Well, you don't know the name of the waiter who was there? [56] A. No, sir.

Q. Let us go back to the time you were looking in the chill box. A. Yes.

Q. Before the accident happened; now, you didn't know the name of the waiter that was standing next to you? A. No, sir.

Q. Well, you knew if there was a waiter or a person standing there, didn't you?

A. That is possible; yes, several of us were in there at one time, yes.

Q. Well, you remember, you knew he was there and you knew that he had opened the door, did you not? A. No, I didn't.

Q. Well, you knew that there was a waiter that was there, standing there, you were working with, didn't you?

A. No, sir; I didn't know he were working in the box I were working in, no, in no parts of it.

Q. Well, did you know the other door was open?

A. No, I didn't.

Q. You didn't? May I show the witness his deposition, your Honor?

The Court: Yes.

Q. (By Mr. Welsh): If you will read from your deposition, Mr. Barrett. Incidentally, did you sign the deposition? [57] Yes, you signed it. And

(Testimony of Porter Barrett.)

read from around line 15 or 16 on page 14 through all of page 15.

A. You wish me to read this aloud?

The Court: No. Just read it to yourself.

(The witness examines his typewritten deposition.)

Q. (By Mr. Welsh): Now, have you had a chance to read the two pages I showed you?

A. I didn't read all the last one here. I read half of it.

Q. Will you finish page 15, please.

(Witness examines said deposition.)

Mr. Werner: May I see that, Mr. Welsh?

Mr. Welsh: Oh, yes.

Q. Now, you have read the two pages, have you, sir? A. Yes.

Q. Now, may I ask you again if that doesn't refresh your recollection?

The Court: Counsel, read it aloud. The court or counsel does not know what it is unless you read it aloud. Read it into the record and then ask him whether or not it refreshes his recollection.

Q. (By Mr. Welsh): All right, sir. I will start on page 14:

“Q. Well, just immediately before the accident, Mr. Barrett, did you see him beside you [58] working or looking into that right-hand side of the chill box?

(Testimony of Porter Barrett.)

“A. Shall I use the phrase for that, sir, we call it in serving dinners and any meal, we use the phrase “Up tree.” Everybody is so busy, he’s trying to think of one thing.

“Q. You answer this question, if you can.

“A. I don’t remember.

“Q. I know there are a lot of details in your job. I want to know if you saw him there beside you. He would be roughly on your right-hand side, wouldn’t he? A. That’s right.

“Q. I want to know if you saw him there, sir, just before the door struck your head.

“A. I couldn’t absolutely say it was Al Williams or anyone because there were seven or eight men in the pantry, and I was not looking directly in it, and I didn’t recognize him, that it was him slammed the door at that particular time; it could have been any waiter.

“Q. Did you know that, sir, just before the accident there was a waiter working on the right-hand side of the chill box?

“A. I know the door was open. I don’t know who [59] was working until after the accident and he hollered, ‘Oh, I am sorry’; then I looked up and I saw who it was from a sitting position on the floor.”

Now, up to that point, does that refresh your recollection and do you now remember that when you were looking in the chill box, you knew that the other door was open?

(Testimony of Porter Barrett.)

A. It is possible, sir.

Q. (By Mr. Welsh): This testimony that you gave previously under oath and which you signed, you stand by that, do you not? A. Yes, yes.

Q. (By Mr. Welsh): Yes. Then, later on:

“Q. And you know someone was working at the right-hand side of the chill box, but you didn’t know it was Al Williams until after the accident, is that correct?”

“A. It was possible I knew he was the one that slammed; he admitted he slammed the door on my head.

“Q. You knew there was a waiter there working on the right-hand side but you didn’t know it was Al Williams until after the accident?”

“A. That’s right.”

All right, sir. Now, did you find what you were looking for? You say you were looking in the left-hand side of [60] the chill box?

A. I had opened that door, the lefthand door and were looking into the box, yes, sir.

Q. Are you sure you weren’t over on the right-hand side and that Williams was to the left? Are you sure you don’t have it just turned around?

A. I don’t know; it has been so long. As far as my memory serves me, I were on the lefthand side; as far as my memory serves me.

Q. That is a fair statement. Let us assume your memory to be right; if you were looking in the lefthand side for something, do you remember

(Testimony of Porter Barrett.)

whether or not you found what you were looking for? A. I hadn't found it.

Q. You had not? A. No, sir.

Q. You hadn't found it and so you moved your head over to look in the other side, did you not?

A. I don't remember whether I did or I didn't.

Q. You don't remember whether you turned to cock your head and moved it over to look on the other side? A. No; I don't.

Q. You do not. You always want to be sure and answer, because when your head is jerking it may look like you say "No" when you may not mean to say "No." At any rate, you do remember—would you like a recess? [61]

A. No. You may continue.

Q. At any rate, you do remember that you got a hit in the head, and would you point to where the door hit you? A. (The witness indicates.)

Q. Right on the top of your head, is that it?

A. Yes; about here (indicating).

Q. As it was closed, as Williams closed it, it hit you on the top of the head? A. Yes.

Q. And after you had put some cold towels on it and rested a little bit, you continued to serve that evening meal, did you not, sir?

A. After changing of jackets and things, about a half hour later I continued.

Q. Then you served the next day and so on into Chicago—I mean to Los Angeles? A. Yes.

Q. Now, you kept on the job and you worked

(Testimony of Porter Barrett.)

every shift through from March 11th, on through December 17th, 1955, is that right? A. Yes.

Q. And you went to certain Doctors in Chicago and you went to see those Doctors in the month of April, did you not; the Chicago Doctors?

A. Yes. [62]

Q. And this twitching, that unfortunate thing you have now, started around the latter part of May or the first part of June, 1955? A. Yes.

Q. Then did you see any other Doctors from May through December of '55? A. No.

Q. In other words, you didn't see any Doctor about this twitching until you went to Doctor, was it Goren, in December of 1955?

A. No. I went to Dr. Bernard Jacobs before I visited him.

Q. But that was in December of '55?

A. Yes.

Q. Dr. Jacobs here in Los Angeles?

A. Yes.

Q. There was no unusual lurch of the train at the time this accident occurred, was there, sir?

A. I believe not; no; no.

Q. Had you ever hit your head on that door before, or since? A. No, sir.

Q. What did you do between April and December, did you just work, I mean, you say you didn't see any doctor; did you work between April and December? [63] A. Yes.

Q. Have you been back to work since December of 1955, have you returned to work at all since De-

(Testimony of Porter Barrett.)

ember of 1955? A. No, sir; I haven't.

Q. Well, you have just renewed your leaves of absence, is that correct? A. Yes.

Q. Which maintains your seniority?

A. Yes.

Q. Have you had some rather severe emotional disturbances in your family?

A. No; not lately, no.

Q. Are you able to stop this twitching?

A. I am not.

Q. Sometimes it is not as great as others, is that right?

A. I don't know, sir, because I don't have no control of it; I don't know sometimes whether I am doing it or not doing it, I don't know.

Q. Don't you know when you are doing it and when you are not doing it?

A. I don't pay too much attention to it; no.

Q. Mr. Barrett, were you ever convicted of a felony? A. Yes.

Mr. Welsh: I have nothing further, your [64] Honor.

Redirect Examination

By Mr. Werner:

Q. Mr. Barrett, that conviction was back in 1935, was it not? A. That is right, sir.

Q. Prior to the time that you were employed by the Santa Fe Railway? A. Right.

Q. And it was under the same name that you were employed by the Santa Fe Railway?

(Testimony of Porter Barrett.)

A. Yes.

Q. And you have continued regularly with the Santa Fe Railway from 1946 until the time of this injury?

A. Yes.

Mr. Werner: That is all.

The Court: You may step down.

Mr. Werner: That is our case, your Honor.

(Whereupon, the Plaintiff Rested his Case in Chief.)

[Endorsed]: Filed August 9, 1956. [65]

United States District Court, Southern District
of California, Central Division

No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

Honorable William M. Byrne, Judge Presiding,

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

Attorney for Plaintiff:

ERWIN P. WERNER.

Attorneys for Defendant:

ROBERT W. WALKER,

HENRY M. MOFFAT,

LOUIS M. WELSH. [67]

Monday, September 10, 1956—2:10 P.M.

The Clerk: No. 19270-WB Civil, Porter Barrett vs. Atchison, Topeka and Santa Fe Railway Company, for hearing motion of Defendant for relief from judgment.

Mr. Welsh: Ready for the defendant, your Honor.

Mr. Werner: Ready for the plaintiff. Have you filed this affidavit, Mr. Welsh?

Mr. Welsh: You mean my reply brief?

Mr. Werner: Yes.

Mr. Welsh: Yes, I have.

Mr. Werner: Then I wish to file this photostatic copy of the Pardon.

Mr. Welsh: No objection.

The Court: It may be received. You may proceed.

Mr. Welsh: We have this morning, your Honor, filed a brief of points and authorities in opposition to plaintiff's reply, and at this time I would like to just briefly set forth the basis of this motion.

Federal Rule 60 (b), as your Honor knows, permits relief from the judgment if the judgment is procured by fraud, misrepresentation, or other misconduct on the part of an adverse party and for any other reason justifying relief.

After this action was over, I personally became somewhat suspicious, and I asked that some undercover surveillance be conducted regarding Mr. Porter Barrett, [69] as a result of which motion pictures, among other things, were taken.

Primarily, the basis of this motion is based upon what your Honor was able to observe at the time of the trial and what we will show by way of motion pictures, together, of course, with the affidavits of the persons who took those motion pictures.

As your Honor will recall, when this case was tried, Mr. Barrett twitched his neck constantly during all proceedings, whether he was on the witness stand, at counsel table, out in the hall, or elsewhere in or around the courtroom. The deposition revealed that at the time his deposition was taken, he twitched quite in the same way as he did in this Court before the Judge and Jury.

When he was asked on the witness stand about this twitching and whether it had always been the same, he said he didn't pay much attention to it and that as far as he knew, it was the same.

Now, he has recently filed an affidavit in which he said that what he meant to say was that he is sometimes free from it, from one to four hours.

Now, the record in this case is pretty clear. Of course, the record is transcribed and subsequently, I would like to go into that in more detail, because I believe that from what plaintiff has said in his own affidavit and taking [70] his own case, you have a situation presented to the Court where at least

it can be said that there was a gross exaggeration, and upon that gross exaggeration, a verdict for \$12,500.00 was brought in.

Now, the Federal Courts have held that on a motion of this sort, the court has plenary power, it can either vacate the judgment entirely or it can remit, it can direct the plaintiff to accept a certain amount, else have the judgment vacated.

As far as I personally am concerned, I would be willing to stipulate to a new trial on the case, if that were the Court's desire after it considers all the evidence we have to present.

If the Court please, at this time I would like to have permission to show the motion pictures which are referred to in the affidavits that have previously been filed. May we do that, sir?

The Court: Yes.

Mr. Welsh: First, if I may, I would like to introduce the film in evidence as exhibits, so that after the file has been completed, we can identify them.

Mr. Werner: Mr. Welsh, I have one suggestion: Don't you think that we should have, and I don't know whether it will bring about anything, the man on the stand stating the circumstances under which he took the pictures? It is merely [71] a suggestion, your Honor.

Mr. Welsh: I don't care.

Mr. Werner: I don't know where these were taken or under what circumstances, and the man taking them is the only one that could tell us.

Otherwise we are cut off from any sort of cross-Examination in respect to that matter.

The Court: Well, of course, he can put on his own case. That all goes to the weight.

Mr. Welsh: I will be happy to lay a foundation.

The Court: He can put it on the way he wishes to.

Mr. Welsh: I will be happy to lay a foundation for these films. Is that what you are concerned with, whether these are the films?

Mr. Werner: Oh, no. I am positive that they are the films that you took of the plaintiff, but I would like to know whether he took other films or whether these are all of them.

Mr. Welsh: All right.

Mr. Werner: And under what circumstances. I have no objection to showing the films at all.

Mr. Welsh: Very well.

Mr. Werner: And I don't know whether they will bring out anything, your Honor. I just think the court should have everything before it, is all.

The Court: Of course, the Court will have whatever [72] Counsel presents. In other words, it goes to the weight. I don't know what he is going to put on there. He may put something on that is not at all convincing to me.

Mr. Werner: All right.

The Court: And he might put on something, and I might sit here and say if you put on such and so or change these figures, it will be more convincing but that is not for me to do. I don't put this case on. All I do is judge it.

Mr. Werner: All right, sir.

The Court: It is for counsel to put on what he wishes.

Mr. Werner: Maybe I am anticipating and that it is imaginary.

Mr. Welsh: I can do as you suggest.

Mr. Werner: All right.

Mr. Welsh: May I proceed, sir?

Mr. Werner: I just felt there was something lacking unless he did. But it is all right. With the Court's statement, I withdraw it, and just go ahead.

Mr. Welsh: May I ask Mr. Richcreek to take the stand. May he?

The Court: Yes.

GEORGE F. RICHCREEK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Give us your full name. [73]

A. George F. Richcreek.

Direct Examination

By Mr. Welsh:

Q. Mr. Richcreek, are you the same Mr. Richcreek who has signed an affidavit which is on file in this matter? A. Yes, sir.

Q. And are you the Mr. Richcreek who took some of the motion pictures referred to in that affidavit? A. Yes, sir.

Q. Now, did you take all of those motion pictures referred to in that affidavit?

(Testimony of George F. Richcreek.)

A. I took all the motion pictures referred to in the affidavit that I signed, yes, sir.

Q. That is what I referred to. Did you bring those very same films here with you today?

A. Yes, sir; I did.

Q. Did you take any other photographs, other than those? A. No, sir; I did not.

Q. Would you please let me have the films that you took. Thank you. Now, you have handed me three packages, little boxes, of Eastman 16mm. Magazine film. Are those all the films that you took or were taken in your presence or under your supervision? A. Yes, sir; they are. [74]

Q. Are these in any particular order, 1, 2, and 3?

A. Yes, sir; they are.

Mr. Welsh: I would like to introduce these three rolls of film, your Honor, into evidence, as Defendant's Exhibits Nos. 1, 2, and 3, or however the Court desires to designate them.

The Court: Very well. They will be received. Do you want them marked as three different exhibits?

Mr. Welsh: If the Court thinks it more convenient that way I don't have any preference, sir. They can be one, as far as I am concerned.

The Court: Well, it depends on what reference you want to make to them later.

Mr. Welsh: Perhaps it would simplify it, if we make them Nos. 1, 2, and 3, sir.

The Court: Very well.

(Testimony of George F. Richcreek.)

(Said three packages of film were marked as Defendant's Exhibits Nos. 1, 2, and 3, and received in evidence.)

Mr. Welsh: You may cross-examine.

Cross-Examination

By Mr. Werner:

Q. Mr. Richcreek, did you have an associate that assisted you in taking these pictures or in keeping Mr. Barrett under surveillance? [75]

A. Yes, sir; I did.

Q. And what is his name?

A. His name is Francis Watson.

Q. Francis Watson? A. Right.

Q. What was the first day that you kept him under surveillance?

A. The first day that I kept Mr. Barrett under surveillance was May 28th, 1956.

Q. May 28th? A. Yes, sir.

Q. And at what point did you first have him under surveillance, the address, the location is what I have in mind?

A. It was at 2929 Van Buren Place in Los Angeles.

Q. And is that the home of Mr. Barrett?

A. I believe it was at that time.

Q. And for how long did you have him under surveillance from the time you started on May 28th?

(Testimony of George F. Richcreek.)

A. I had Mr. Barrett under surveillance for approximately six hours, five to six hours.

Q. And that is on that day? A. Yes, sir.

Q. Did you have him under surveillance the next day? A. No, sir. [76]

Q. When was the next date that you had him under surveillance?

A. I did not have him under surveillance at any other dates.

Q. That is the only date that you had him under surveillance?

A. Yes. I assisted in a surveillance at a later date, but I was not the——

Q. Well, all right. Then, in order that we may have it complete, when was the next date that you either had him under surveillance or assisted in having him——

A. I don't recall the exact date, sir. I would have to consult——

Q. You may refer to any notebook you have or any data. I am just trying to get information.

A. Well, I don't have the information at my finger tips, or I would gladly give it to you. I would have to consult some records to ascertain exactly what the date was, or the affidavit.

Mr. Welsh: May I show him this?

Mr. Werner: Surely, surely. He may look at anything that will refresh his memory.

(Mr. Welsh hands papers to the witness.)

A. On June 26, 1956.

(Testimony of George F. Richcreek.)

Q. (By Mr. Werner): June 26th? [77]

A. Right.

Q. 1956, and was Mr. Watson with you at that time? A. No, sir. He was not.

Q. Who was with you at that time?

A. Mr. Elliott.

Q. And was he the man in charge of the surveillance? A. On the second day, yes, he was.

Q. Well, I am talking about June 26th?

A. Yes, on June 26th, he was.

Q. What is his name? A. Joe Elliott.

Q. And you assisted Joe on that occasion, and what was the location from which you began your surveillance? A. On June 26th?

Q. Yes.

A. The 3100 block on Van Buren Place.

Q. And how long did you have Mr. Barrett under surveillance at that time?

A. I assisted Mr. Elliott that day for approximately—while he had Mr. Barrett under surveillance, for approximately four hours.

Q. Do you know whether Mr. Elliott was there any longer than you were at that time?

A. Yes, sir; he was.

Q. He remained on? [78] A. Yes, sir.

Q. And then, what was the next date?

A. I had never again taken up surveillance on Mr. Barrett.

Q. I see. Then, the only two times that you

(Testimony of George F. Richcreek.)

were interested in having him under surveillance was on the 28th day of May and on that June 26th?

A. Right.

Q. All right, sir. We will go right back to May 28th. When did you first observe Mr. Barrett?

A. I observed him at about 11:00 a.m.

Q. At 11:00 a.m., was he by himself?

A. Yes, sir; he was.

Q. And what was he doing at that time?

A. He was driving his automobile.

Q. And where were you?

A. I was in my automobile.

Q. Then, how long did you keep him under surveillance?

A. For approximately five or six hours.

Q. Well, I know, but where did he go in his automobile? A. The first place he went to?

Q. Yes.

A. He went to a market in the 1500 block on Jefferson Boulevard, that is West Jefferson Boulevard. [79]

Q. When did you first start to take any pictures of him? A. At that time.

Q. In the market?

A. No, sir. As he left the market and returned to his automobile.

Q. How near did you get to Mr. Barrett on this occasion? A. On that particular occasion?

Q. Yes.

A. I would estimate that I was approximately 75 to 100 feet away from Mr. Barrett.

Q. That was an average distance at all times?

(Testimony of George F. Richcreek.)

A. Yes, about that, that is an approximate average, yes.

Q. You are just giving your best estimate, Mr. Richcreek? A. That is right, that is right.

Q. And sometimes it was a little less and sometimes a little more, isn't that correct, it was approximately 75 or 100 feet? A. Right.

Q. Now, did you take any pictures while he was in his automobile? A. Yes, I did. [80]

Q. And while he was driving?

A. Yes, I did.

Q. What kind of an automobile was he in?

A. He was in a 1949 Mercury.

The Court: May I suggest this. You can do it if you want to, but it seems to me that you would be in better position to cross-examine him after you have seen the pictures. You are asking a lot of these questions that will be disclosed.

Mr. Werner: All right.

The Court: You can do what you want, but if I were cross-examining him, I would want to look at the pictures first and then question him.

Mr. Werner: Well, I think maybe I would. I don't know any more about the pictures. I will just reserve cross-examination.

The Court: You can just remain there, Mr. Richcreek. It may be that during the showing of the pictures there will be some questions they will want to ask during the operation.

Mr. Welsh: If your Honor please, I was going to have Mr. Richcreek operate it.

(Testimony of George F. Richcreek.)

The Court: He can testify from down there. If you have any questions, you can stop it.

Mr. Welsh: And then he can resume the stand again, [81] your Honor, which is the only reason for it.

The Court: Well, Mr. Richcreek understands that while even he sits at the counsel table operating the machine, if you are asked a question while you are there, it is just the same as if you were on the stand.

The Witness: Yes, sir.

The Court: In other words, you are under oath and you are testifying, and it may be that I may want to ask a question. It may be that during the course of the showing of the picture, some questions may be asked.

Mr. Welsh: If your Honor please, I would like to put Mr. Elliott on and lay the foundation for that and then show both pictures.

The Court: Now, as I understand it, these three pictures that have been presented here now were pictures that were taken by Mr. Richcreek.

Mr. Welsh: That is correct.

The Court: And you have some more pictures that were taken?

Mr. Welsh: By Mr. Elliott.

The Court: Well, don't you think we better dispose of this first?

Mr. Welsh: Very well.

The Court: It seems to me the way you have

(Testimony of George F. Richcreek.)

that rigged up—have you tried that on that [82] screen?

Mr. Welsh: Yes. The light just touches the corners. Can your Honor see the screen the way it is?

The Court: Yes, I can see it.

Mr. Welsh: I think you can come over here, Mr. Werner.

Mr. Werner: Just so I see the screen here. I think that probably is a little better.

(The courtroom was darkened and a motion picture film was shown on screen before the Court.)

The Court: Is that the defendant?

Mr. Welsh: That is the plaintiff, yes, sir.

The Court: Rather, the plaintiff?

Mr. Welsh: Yes.

Mr. Werner: What is this location?

A. This is in the 1500 block on West Jefferson Boulevard.

Mr. Werner: Is this where you got to the point where you said he was shopping?

A. That is right. He went in the market and came out.

Q. He did not have any other business there?

A. I didn't see any.

Mr. Werner: That is all right.

The Witness: May I have the light, please?

(The courtroom was again lighted.)

(Testimony of George F. Richcreek.)

Mr. Welsh: I would like to say, your Honor, that if [83] they are not too distinct from where you are sitting, we could bring the screen closer, because you can see in detail if you are close enough to them.

The Court: Well, I assumed that you fixed it up there in a manner that we will get the best view of it.

Mr. Welsh: Well, we fixed it up in the manner in which the Bailiff told us to. I would personally prefer that the screen be closer.

The Court: Make it closer, then.

Mr. Werner: Well, I want it put where it will be the most distinct, because I expect to have something to say about that.

Mr. Welsh: Well, it was a little far away from where he was sitting.

Mr. Werner: Well, get it closer. I agree with the Court that they should be put in the most advantageous position that you can find.

Mr. Welsh: Well, I would like to have them as close to the Bench as possible.

The Witness: That will give you a smaller picture.

Mr. Welsh: I want to get the picture closer to the Judge.

Mr. Werner: I don't know as that will make it more distinct. That is the thing.

The Court: I have one of these 16 millimeter machines. [84] I haven't used it for some time, but I have always found that if you get a larger

(Testimony of George F. Richcreek.)

picture, you get it away at a greater distance, but it is not as distinct.

Mr. Welsh: Yes, sir.

The Court: And then, of course, sometimes you get it in closer, but there is always a point where you get a good sized picture and a good distinct picture.

Mr. Welsh: Yes, sir.

The Court: I thought that is what you folks were doing out here, while I was in chambers, that you were arranging it where you could get the most distinct and clearest pictures.

Mr. Werner: I thought they were.

Mr. Welsh: No. Do you think it would be clearer if we moved the machine down here?

The Witness: We can move the screen down here and see. It would be easier to move.

The Court: Move the screen down here, then. That is why I asked you the question to start with, because it seems to me that is a long distance for a 16 millimeter projector.

Mr. Welsh: Yes, sir.

The Court: Now, the probability is that you will have a little smaller picture, but a more distinct picture.

Mr. Welsh: Yes, that is what I would like to have.

The Court: Are you going to run the same one over [85] again?

The Witness: No, I wasn't going to.

(Testimony of George F. Richcreek.)

The Court: I think perhaps you better. Do you have another one in there?

The Witness: Yes, sir.

The Court: Well, use that one and then run the other one afterwards.

(The courtroom was darkened and one of said motion pictures films was shown on the screen before the court.)

The Court: Where is this?

A. This is on, I believe it is, East 33rd Street.

The Court: You can make any comment you care to, if you want to describe the picture or anything about it.

The Witness: This is the 300 block on East 33rd Street.

Q. (By Mr. Werner): Is that the plaintiff there? A. Yes, it is.

May I have the lights, please?

(The courtroom was again lighted.)

Mr. Welsh: Mr. Richcreek, if you will play the first one over again. I think this is more distinct.

Mr. Werner: I think it is more distinct.

The Witness: Well, on the first picture, there wasn't as much sun; there was a little——

Mr. Welsh: Well, play it over there and see if there [86] is any difference in it now.

The Court: Is there fifty feet of film in each one of those rolls? A. Yes, your Honor.

Mr. Werner: Well, that last one didn't have?

(Testimony of George F. Richcreek.)

A. It wasn't completely exposed.

Mr. Werner: It wasn't completely. Was the first one?

A. Almost. There were probably five or between five and ten feet at the end of the roll that wasn't exposed.

(The courtroom was again darkened.)

Mr. Welsh: Now, you are replacing the first roll?

A. This is the first roll.

(Said motion picture film was again shown on the screen before the Court.)

(The courtroom was again lighted.)

Q. (By Mr. Welsh): Now, you have shown Defendant's Exhibits Nos. 1 and 2 and you are now about to show Defendant's Exhibit No. 3; is that correct?

A. Yes, sir.

Q. (By Mr. Werner): And where is the locale of this, Mr. Richcreek?

A. These pictures were taken near Sixth and Bixel, Los Angeles.

Mr. Welsh: I can be more specific about the exact location. [87]

Mr. Werner: Well, I know just exactly where that is.

(The courtroom was again darkened and said motion picture film was shown on the screen before the Court.)

Q. (By Mr. Werner): Is that the plaintiff there?

(Testimony of George F. Richcreek.)

A. Yes, sir; that is the plaintiff, without the hat on.

Q. (By Mr. Welsh): In the black coat?

A. Yes, sir.

Q. And he is twitching in that, is he?

A. Yes, sir; he was moving his head quite a bit.

Mr. Werner: Well, I couldn't see it——

The Witness: I believe it is more noticeable with the hat on him.

(The operation of the projection machine was stopped and the courtroom again lighted.)

Q. (By Mr. Werner): Were those all you participated in, Mr. Richcreek?

A. Yes, sir. These are all the pictures that I took.

The Court: Was he twitching his head all during that?

A. During this last roll, yes, sir; he was.

The Court: All the time?

A. Yes, sir.

Mr. Welsh: Now, I would like to call Mr. Elliott, if I may, your Honor.

Mr. Werner: Will you tell us, that third one was on [88] West Sixth Street, wasn't it, Mr. Richcreek?

A. Yes, sir; West Sixth and Bixel.

Mr. Werner: And Bixel.

JOE W. ELLIOTT

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Give us your full name.

A. Joe W. Elliott.

Mr. Welsh: If I may, your Honor, I would like to give Mr. Elliott a copy of his affidavit.

The Witness: I have my original notes.

Direct Examination

By Mr. Welsh:

Q. You do? A. Yes.

Q. Did you take motion pictures of the plaintiff, Porter Barrett, Mr. Elliott? A. I did.

Q. On what day or days did you take those pictures?

A. On June 25, 1956, and the following day, June 26, 1956.

Q. On June 25th were you accompanied by anyone? A. On June 25th, no, I was not.

Q. And on June 26th, were you accompanied by anyone?

A. For several hours on June 26th, I was accompanied by Mr. Richcreek, for purposes of positive identification. [89]

Q. You did take certain motion pictures yourself. Did you bring those motion pictures with you?

A. Yes, I did. I have them here.

Q. Did you bring all of them?

(Testimony of Joe W. Elliott.)

A. All of them, yes.

Q. May I have them, please. I notice that you have given to me four boxes apparently containing Eastman Kodak Motion Picture Film numbered 1, 2, 3, and 4. Do the numbers on the boxes indicate the order in which they were taken?

A. That is correct.

Mr. Welsh: If I may, your Honor, I would like to introduce these in evidence as Defendant's Exhibits 4, 5, 6, and 7.

The Court: Very well. They will be received.

(Said four packages of Motion picture film were received in evidence and marked as Defendant's Exhibits Nos. 4, 5, 6, and 7.)

Mr. Welsh: You may cross-examine.

Cross-Examination

By Mr. Werner:

Q. Mr. Elliott, is that the name?

A. That is correct.

Q. Did you take pictures at all times that you had Mr. Barrett under surveillance?

A. Absolutely. I took every foot of motion pictures [90] I could get.

Q. And on the 25th, what was the locale of that?

A. Of the first motion pictures?

Q. Yes.

A. In the 700 block on South Mateo.

Q. And what was the next time? The 26th.

A. Did you say the 25th?

(Testimony of Joe W. Elliott.)

Q. Well, the 25th was in the 700 block of South Mateo, is that right?

A. That is correct. Well, there was one sequence—there were additional sequences there, the same day, the man did a lot of driving around town.

Q. All right, but you took them while his car was moving?

A. Well, shortly after his car started to move. Of course, you cannot wait until he is driving out of sight. You let him drive a few feet, and that is all I could get of him moving.

Mr. Werner: Well, I think I will reserve any questions until after you have shown the pictures.

The Witness: All right.

Mr. Werner: When you said there were different sequences——

The Witness: Yes, that is right. [91]

Direct Examination
(Continued)

By Mr. Welsh:

Q. You are about to show these Defendant's Exhibits 4, 5, 6, and 7, in that order, is that correct?

A. That is correct.

Q. Pardon me, if I may bring this just a trifle closer, your Honor.

The Witness: All right.

(The courtroom was darkened and motion picture film was shown to the Court.)

(Testimony of Joe W. Elliott.)

Q. (By Mr. Welsh): There is the plaintiff?

A. There is the plaintiff. He is sitting in the driver's seat of that automobile. He is reading something.

He is wearing a straw cap with a visor.

Mr. Werner: Anyone else in the car with him?

A. There is someone else in the car with him, yes.

Q. (By Mr. Werner): Male or female?

A. I believe it was a female next to him.

A man just entered the car, and is sitting there in the extreme right side of the front seat now.

Q. Then, there were three in it?

A. Three at this point.

Q. Yes.

A. There were only two at the beginning of the sequence. [92]

Q. All right.

A. The plaintiff is on the right.

Q. Is this on South Mateo?

A. Here is an identification, right there, Adams Boulevard and 1800 West. That is the plaintiff there walking into that liquor store.

In this case, the plaintiff was on the near side, nearest to us.

That is the plaintiff entering the car.

(The operation of the motion picture projection machine was stopped and the courtroom again lighted.)

(Testimony of Joe W. Elliott.)

Cross-Examination

By Mr. Werner:

Q. What period of time does this film cover?

A. What period of time?

Q. Yes.

A. In what respect? There are sixteen frames per second.

Q. Then, I should think you would know pretty well how long it takes to take it. How many frames did you take?

Mr. Welsh: Wait a minute. Did you mean how much time does it take to expose that much film?

Mr. Werner: I guess that is what I want to ask.

Q. How much time would it take to expose the amount of film that you displayed here? [93]

A. Roughly two minutes.

Q. Roughly two minutes?

A. Yes, but of course, the two minutes is focus and is several sequences.

Q. Well, I want to ask that about the other pictures, and we will get back to that later. Then, this entire film here covered two minutes?

A. Two minutes showing time and two minutes actual running of the camera; but over the period from the first sequence to the last sequence upon this particular magazine of film, I can give you the exact time if you would like.

Q. Yes, I would.

(Testimony of Joe W. Elliott.)

A. The first 25 feet were taken at 3:11 p.m. The next 13 feet were taken at 3:35 p.m.

Q. All right. Just a minute. You took the first picture at 3:11? A. Yes.

Q. And when did you conclude it?

A. Well, I began it there. I had my hands full. I was pretty busy. I could not check my watch from the time of starting.

Q. All right. I just want a rough estimate as to how much time that amount of film run.

A. 25 feet run approximately one minute.

Q. All right. And this covered about two minutes? [94] A. Approximately.

Mr. Werner: All right.

Mr. Welsh: I might say, Mr. Werner, that the affidavit indicates the times at which these pictures were taken, each one.

Mr. Werner: Yes, it indicates the time, but not the duration of time.

Mr. Welsh: Not the running time, that is right.

Mr. Werner: That is all I am trying to prove, Mr. Welsh.

The Witness: It is at 16 frames per second, and there are 40 frames to the foot.

Mr. Werner: Well, I will let you figure the time, if you will.

A. Counsel, it is very difficult to say exactly the time I started and finished.

Mr. Werner: Well, you are just asked for your estimate, and I asked for some fairly accurate hypothesis of this thing.

(Testimony of Joe W. Elliott.)

Direct Examination

(Continued)

By Mr. Welsh:

Q. Now, you are about to show Defendant's Exhibit No. 5, are you? A. That is correct.

Because of the plaintiff being of a dark complexion, I purposely over-exposed these films so we could establish [95] his positive identification.

Mr. Welsh: You just show the pictures and answer the questions.

The Witness: All right.

Mr. Welsh: Go ahead.

(The courtroom was darkened and said motion picture film was shown to the Court.)

Q. (By Mr. Welsh): That is the plaintiff?

A. That is the plaintiff, that is correct.

Q. (By Mr. Werner): With some object in his hand? A. That is right.

Q. (By Mr. Welsh): Which one of those, if any, is the plaintiff? A. On the left.

(The witness stopped the operation of the motion picture projection machine, and the courtroom was relighted.)

(Testimony of J  e W. Elliott.)

Cross-Examination

By Mr. Werner:

Q. How long a period did that cover, Mr. Elliott? About two minutes?

A. I would say it covered approximately a minute and a half.

Q. A minute and a half?

A. Approximately, yes.

Q. What was the location of that, and the date? [96]

A. I will check my notes, now, and give it to you.

Mr. Werner: That is fine. First, the date?

A. That was June 26th, at Broadway and Washington Boulevard.

Q. Broadway and Washington Boulevard?

A. Yes, sir.

Mr. Werner: All right. Thank you.

Direct Examination

(Continued)

By Mr. Welsh:

(The courtroom was again darkened and motion picture film shown to the Court.)

Q. Which is the plaintiff, if any?

A. The plaintiff is hitching up his trousers here in the center of the screen.

Q. Is that the plaintiff smoking a cigarette?

A. On the right.

(The witness stopped the operation of the motion picture projection machine.)

(Testimony of Joe W. Elliott.)

Cross-Examination

By Mr. Werner:

Q. How many minutes was that under exposure?

A. Approximately a minute and a half, a minute and forty seconds. [97]

Direct Examination

(Continued)

By Mr. Welsh:

Q. This is the last one, and it is Defendant's Exhibit No. 7? A. Yes.

(Said motion picture film was shown to the Court.)

Cross-Examination

By Mr. Werner:

Q. And what date was this, Mr. Elliott?

A. The same date, June 26th.

Q. The 26th, and where?

A. I will have to check the location.

Q. All right.

A. I believe it is South Main Street.

Mr. Welsh: That is the plaintiff with the visor cap, is it?

A. That is right. The plaintiff is on his right; he just took his cap off.

And he is on the left.

(The witness stopped the operation of the motion picture projection machine.)

(Testimony of Joe W. Elliott.)

Q. (By Mr. Werner): How long was that?

A. Approximately 30 or 40 seconds.

Q. And is that also on June 26th?

A. Yes, it was. [98]

Q. And where, Mr. Elliott?

A. South Main Street, the 1000 block South Main Street.

Mr. Welsh: Do you desire to further question this witness?

Mr. Werner: No. I think I have asked him everything I care to.

Mr. Welsh: Mr. Elliott, would you take the stand for just a moment.

(The witness returned to the witness chair.)

Redirect Examination

By Mr. Welsh:

Q. During the two days over which you took these pictures that you showed, were you making an effort to keep from being observed by the plaintiff? A. Oh, yes, I was.

Q. And did you see Mr. Barrett on any occasions other than those which you photographed?

A. Possibly, but it was only while I was trying to take pictures of him; in other words, we tried to get as many pictures as possible.

Mr. Welsh: I see. All right. I have nothing further. Thank you.

Mr. Werner: I have no cross-examination.

Mr. Welsh: Now, your Honor, basically our mo-

tion is [99] based upon the misrepresentation of the plaintiff in that in his case, which was tried before this Court, he not only twitched constantly, but he testified to the effect that it had been worse ever since the 1st of June, 1955.

We also point out in our memorandum of points and authorities and our affidavits disclose the income interest of Dr. Darrington Weaver. Now, that is background. That in itself spells nothing, but coupled with the other factors that we believe now have been admitted by plaintiff's own affidavits, it indicates at least a gross exaggeration.

I would like to particularly point out this: in plaintiff's nine affidavits and brief that were filed in opposition to our motion, not one single fact that we set forth did he deny. The only denial was that Dr. Weaver said that he had not in fact talked with me on the telephone or otherwise.

But Porter Barrett did not deny that he had been observed in a normal condition by these three people who filed affidavits, two of whom are in Court here today. He did not deny that when he came to my office, that he had twitched his neck constantly, and just as he did in Court, but when he departed and went down the corridor, as I have indicated in my affidavit, I opened the door of my office after he got in the corridor and observed him, and he did not deny in his affidavit that as he stood waiting for the [100] elevator, he was perfectly normal, although just a few minutes before that, he was twitching and contorting with the same constant frequency as he did in this courtroom.

In addition to that, plaintiff has made certain statements which indicate he is quite capable of being precise if he cares to do so. When he was testifying in this case, page 35 of the transcript, the original of which is on file, your Honor, there is this question from plaintiff's own counsel:

"Q. Now, when was the first time—I notice the jerking of your neck—when did you first notice this jerking of your neck and head?

"A. Oh, the last of May or the first of June, somewhere along in there, I believe it was."

Now, as your Honor will recall, he saw doctors in Chicago up to the last of May. None of those doctors reported a jerk. He said himself he did not jerk, and then it started in the first of June and that continued until December, 1955. Between June and December, he saw no physicians, but on December 17th he saw Dr. Darrington Weaver, and then he quit his work.

"Q. And has that continued since that date?

"A. Yes.

"Q. And has it improved, gotten better or worse?

"A. No; it hasn't." [101]

Now, on cross-examination in this courtroom, I said to him:

"Q. Are you able to stop this twitching?"

He said, "I am not."

I asked, "Sometimes it is not as great as others, is that right?"

I gave him the opportunity.

He said, "I don't know, sir, because I don't have

no control of it; I don't know sometimes whether I am doing it or not doing it, I don't know."

Now, I ask that the Court compare this answer with the statement in his affidavit where he states that he is free from jerking from between one to four hours.

Now, the next question was:

"Don't you know when you are doing it and when you are not doing it?"

"A. I don't pay too much attention to it; no."

Yet, now, he files an affidavit in which he says he is free from jerking from one to four hours.

Now, I realize that this is a serious charge that I bring, but the law and the Federal Rules do not require that we prove fraud only. It is fraud, misrepresentation, or other misconduct, and any other act of the plaintiff which would justify the defendant being relieved from the judgment, or it could be the other way around. The plaintiff could [102] make a motion if the defendant were guilty of misconduct.

It is interesting to note that the affidavits that they filed of the seven employees of the railroad do not in any way contradict anything that we have put in here either, nor do they add anything to their case. Three of the affiants in those affidavits state that they had observed him jerking during the past several months. Well, I have observed him jerking during the past several months, too, and we don't contend that he wasn't jerking during the past several months. The question is whether or not he misrepresented the true statement of his condition at the time of this trial.

In another affidavit plaintiff files, the affiant says he has known him for ten years and has lived in the same neighborhood. All he can say is that he has observed him during the past several months. Now, let's see. Yes, "during the past several months I have observed him intermittently jerking his head."

So that those affidavits do not add anything to the issue which we have presented to this Court.

Now, I particularly rely on the case of *Rice vs. Rice*, which is a California case.

Rule 60(b) was taken directly from Section 473, that is, it was based upon Section 473 of the Code of Civil Procedure and the Federal Rules revisors' notes so [103] indicate. The cases have held that because of that the State authorities, insofar as they pertain to Section 473, are appropriate in connection with Rule 60(b). We have cited cases, and we have cited a section of Moore's Commentary which brings that out.

The case of *Rice vs. Rice* was based on Section 473, and I particularly call the Court's attention to that, for this reason: In that case, which was a divorce action, the husband had testified in such a manner as to imply that he was still the owner of certain property which he had been owner of. He didn't say he owned it. On the contrary, when he was asked the direct question whether it was in his name, or something to that effect, he said, "No," but, by reading what the Court has to state, it is obvious that the whole tenor of his testimony was calculated to mislead. I have discussed that on page 9 of our opening brief. Even in that case, the Court

said that this was a fraud on the Court and the judgment was set aside because he should have disclosed the fact that he had gotten rid of this particular piece of property, although he made no misstatement at all.

The answer that this Court will give to our motion is based more upon philosophy of what should be done in situations like this rather than technical rules. [104]

There was a time when we had the very strong doctrine of caveat emptor covering the marketing of products so that every commercial transaction could not be upset just because some poor dupe was taken advantage of. And, as the Court knows, over the past 20 years, that doctrine has been almost completely dead and under the Federal Trade Regulations, if a company advertises in a way to mislead the gullible public, it can be struck down and punished under the Federal law.

Again, there has also been a doctrine of law that Civil judgments should not be set aside, but again the doctrine expressed in the Federal Rules of Procedure and the application of them by the Federal Courts has been such as not to tolerate misrepresentation to a gullible jury or whoever it might be. Even if they weren't gullible, I think sophisticated people would have been disillusioned by this situation, and certainly a court of justice, the highest courts—that is, the highest tier of courts in this land, the United States courts—should not be misled by gross exaggeration just because we know it is done, any more than it is right for a cigarette

company to do this because everybody does it. If they don't permit them to do it in that field, certainly they shouldn't permit them to do it in a court of justice.

In trying to view this case not as an advocate, but in making an attempt to see it objectively, I can see that there would be sufficient basis for the jury to have found [105] the railroad company negligent in this case. We contested that issue, but there is no question but that there was ample evidence to support a verdict of negligence, assuming that there probably would be some evidence of some damage.

There are cases that hold where the party has committed some fraud or misrepresentation, the Court will not dissect and try to determine how much of the verdict was due to misrepresentation and how much was due to the actual tort, but the cases hold, and we cite a United States Supreme Court case for the proposition, that the whole judgment will fall if it is in any way tainted with chicanery.

However, this Court has in its discretion to do justice in this matter, and it seems to me at least, the least can be said is that a judgment for this amount, which was based upon a set of facts that even the plaintiff now admits is not true, he says it is no longer true, a judgment based upon that type of thing where he admits or admits through failure to deny that he walked into my office jerking constantly, just as he did in this courtroom, and that he walked out of there, and while he was waiting for the elevator, I saw his neck just as straight as

though nothing were the matter with it, it doesn't seem to me to be justice that a verdict based upon that type of evidence should be permitted to stand.

Thank you.

Mr. Werner: May it please the Honorable Court: [106]

I attempted to digest and read the Rice case thoroughly, but I could find no application of the facts there to the one here at Bar.

As I remember the facts in the Rice case, at the conclusion of the trial, both the attorney for the plaintiff, I think it was, and the plaintiff himself, had knowledge of the fact that the plaintiff had title to the property in the plaintiff's name, and at the conclusion of the trial, the Court intimated that he was going to give judgment based upon the fact that the plaintiff had title in his own name, and at that time the counsel for the plaintiff and the plaintiff knew that he had already transferred the property to some other person, and, of course, there wasn't anything else the Court could have done, under the circumstances, but hold that that was a reprehensible act on the part of both the plaintiff and counsel, and he did not exclude counsel for the plaintiff in that action at all.

Now, here, the portion of the Rule, if any, that has application to our case, and upon which the defendant must rely is the one that the judgment was obtained by fraud, and there isn't any question but what the Rule is that fraud must be proved by clear and convincing evidence. I only cite one Federal

case to that effect, but there is no other rule to the contrary.

And let us examine the facts in the case and find out [107] where the fraud is, if any, and that would have had to have been some fraud perpetrated prior to the time of the trial or at the time of the trial itself.

The only assistance, as I view the evidence of those pictures or the affidavits of these gentlemen who had the plaintiff under surveillance, would be for the Court to draw an inference to the effect that this injury did not exist and that, therefore, a fraud had been perpetrated upon the Court and the jury. Otherwise, it has no place here.

And there is no opposition, and Mr. Welsh doesn't contend there is, to the effect that where an issue could have been put before the Court and the jury at the time of the trial, it should have been done. These things shouldn't be tried piecemeal, or the defendant should not wait until after the trial and then upon a motion of this kind attempt to try it again under the same facts.

And I contend, your Honor, that there have been no additional facts.

And in respect to being more definite on the part of the plaintiff in this action, he was under the control of the counsel in the case at the time he was being examined. May I have the transcript of plaintiff's testimony that was written, page 64?

Mr. Welsh: Here, you can have my copy.

Mr. Werner: I will take yours. This is bound in. [108]

I think Mr. Welsh read all of the evidence with respect to the direct examination, but before coming to Court, I read the only cross-examination I could find, and part of that, and I know that Mr. Welsh would have read it all, had he thought it had any materiality, and here is the only cross-examination in respect to the matter of a twitching:

“Q. Are you able to stop this twitching?”

“A. I am not.”

And I think that is the inference to be drawn from the doctor’s testimony that it isn’t a voluntary thing; it is done, and it is beyond the control of the plaintiff as to whenever it does occur. But there is nothing said there as to the period, the duration of the periods over which this twitching extended, so we can start out with that he didn’t twitch all night and he never intended to state that he did.

A further question:

“Q. Sometimes it is not as great as others, is that right?”

“A. I don’t know, sir, because I don’t have no control of it; I don’t know sometimes whether I am doing it or not doing it, I don’t know.”

And let me interpolate there to say that is why it is impossible for this plaintiff to state positively and honestly whether at a particular time covering a minute or a minute and a half during a day, or on any particular day that he did or did not twitch at that time; it would be impossible. [109] Therefore, he could not say as a patent matter of fact, based upon his memory, whether during that minute or minute and a half, and to which his atten-

tion was not called, and he had no reason for recalling it, because he did not know whether he was being under observation or not; he would have to say that he didn't know, because his doctor will state and he will state that it isn't a continuous performance.

Mr. Welsh brought out very clearly at the time of the trial in the cross-examination of the doctor that that torticollis was either due to a lesion of the brain or to an emotional impetus, and the lesion of the brain was eliminated, so it was the emotional thing entirely, and that during times of stress, particularly appearing before this Court, particularly where a layman appears before this Court, certainly he is under greater stress, he would jerk constantly; he would have the same doctor and in the event that he were to appear again, it would be just as strained and just as intense as it was during the trial that we had here during the month of May. It is a matter that is beyond his control.

When trials are over and the litigation subsides and those matters of discretion are cast aside, of course, the strain is less, but he still has the torticollis during periods that he cannot designate with any great accuracy. He could probably pinpoint it a great deal better if he were interrogated more closely by counsel, but during the time of [110] trial apparently it was the object of the counsel in trying the case, and it was tried very well, not to place too much stress upon the injuries for fear that it might enhance the verdict, and that is why probably they did not put the doctor on the stand who examined

this plaintiff, and more than likely the plaintiff jerked considerably when in the doctor's office where he is under great strain.

The only inference that I can draw from the fact that this doctor for the Santa Fe Railroad did not come here in Court is that his testimony would have been similar or would not in any great respect contradict the testimony of the plaintiff's doctor on the stand.

Now, continuing here:

"Q. Don't you know when you are doing it and when you are not doing it?

"A. I don't pay too much attention to it; no.

"Q. Mr. Barrett, were you ever"——

Then he goes into the conviction of the plaintiff.

Now, as far as I have been able to find, the only other reference to the twitching, and that has no bearing here, was on page 63, one question:

"Q. And this twitching, that unfortunate thing you have now, started around the latter part of May or the first part of June, 1955?

"A. Yes." [111]

I don't think there is any other reference to the twitching, other than that; which shows that the matter was not gone into with any great particularity at the time of the trial and the thing was left in great generalities, of course.

I would say now that if we were to retry the case and having then heard the testimony of the undercover men, we could pinpoint it to that extent. But that was at a time after the trial.

Now, there was no reason why—or, Mr. Welsh

didn't go into the matter of the conspiracy of Dr. Weaver, but I think that is a matter upon which at least in the affidavits, he placed great reliance, and he set up in the affidavit evidence that I am sure this Court wouldn't allow a jury to consider at the time of the trial. Of course, we have no objection to the Court reading the case, that is the case and circumstances from which he was exonerated or a pardon granted by Governor Knight during the year of 1953. But in their statement of the matters which Dr. Weaver was charged with, from none of the acts or a combination of these innocent acts could the Court infer fraud, particularly fraud prior to the time or during the time of the trial, and I want to allude to those. Mr. Welsh sets them out.

Well, first, they are the fact that he employed Dr. Weaver and, of course, no culpable act can be inferred from that because Dr. Weaver is licensed to practice his profession [112] here in the State of California.

The other act was that he sent the plaintiff in the action to Dr. Goren. But, of course, no attack is made upon Dr. Goren, nor could there be, but the inference is that this torticollis was conceived by Dr. Weaver on December 17th, and that is why the affidavits of the co-employees here stated that he had this jerking of his head and of his neck from a time within three months after the time the accident occurred down to the present time.

Now, I may be wrong about this, and I didn't go down and get any cases. I don't think it requires it, but I think the fact that the employees of this de-

fendant were in possession of such knowledge is imputed to and becomes the knowledge of the defendant itself and particularly under the circumstances where we subpoenaed three of their witnesses and they were instructed not to appear because they were not subpoenaed legally, and on that point I don't make any question, whether they got the right advice or not. That isn't the point that I wish to make. But, if the defendant was interested in hearing somebody that had information and knowledge about the condition of the plaintiff, they would have allowed these defendant's employees to come in and testify at the time of the trial.

Now, the affidavits disclose that immediately and as soon as Dr. Weaver met the plaintiff and he became a patient, [113] he wrote a letter and notified the defendant, and that is set forth in his affidavit, he setting forth what his diagnosis was. Then again the defendant asked for more details, and on January 14th, Dr. Weaver again wrote a letter to the defendant and set up more details.

Surely Dr. Weaver wasn't hiding his connection or association in the case and in that regard he said that he referred him to several other specialists, who came to the same conclusion and diagnosis that Dr. Weaver had come to.

Now, Mr. Welsh observed that Dr. Weaver came here and as he stated, I don't know how he arrived at what he did here, the fact that he observed the proceedings of this Court. He probably did observe, but Dr. Weaver in his affidavit states that he came here prepared to testify in the event his testimony

was needed, and the evidence discloses, even the information that the defendant has, that he had information that if he wished to become a witness, that depended upon the judgment of counsel for the plaintiff, he could have been called upon, but, I don't know as it would have made much difference but it was my conclusion that Dr. Weaver could have been asked whether he had been convicted of a felony. He probably could have disclosed the fact that he had been pardoned, but with the state of the evidence at that time, I felt that Dr. Weaver could not have added any testimony that was testified to by Dr. Goren, who in my opinion made a very [114] clean-cut witness. His cross-examination wasn't extended. The defendant didn't seem to make any serious or extended attack upon it, and it was allowed to stand unchallenged, both in respect to cross-examination and in respect to his position being challenged by the doctor who examined the plaintiff on the part of the defendant in this action.

I want to allude to this: in the affidavit of Mr. Welsh, he states that these are the things disclosed by the undercover men: Mr. Barrett drove his automobile, visited and talked with his friends, walked down the street, went shopping, performed other natural functions without a trace of the twitch which was so evident during the trial.

Well, if Mr. Barrett twitched or didn't twitch, I wasn't able to observe it, and even the one when they admit that he twitched all the time appeared no different to me than the others. Now, I am saying

that that is only my observation. The observations of the Court may have been different and Mr. Welsh's may have been different.

And so those are the revealing facts that he says intimate, amounts to fraud.

Mr. Barrett walked freely around the courtroom. For nine months he worked for the railroad, admittedly. He performed all the duties necessary to a waiter upon a train, working on a moving train carrying heavy plates of food and utensils, for nine months and, sure, when he saw his doctors, [115] this condition was getting worse and it was necessary to undergo treatment.

And if Mr. Barrett had been asked on the trial whether he drove his automobile, he would have said, "Yes," and he visited and talked with his friends. It was apparent that he talked to his counsel and walked around here and no attempt was made to conceal that. He certainly could talk with his friends.

There isn't any contention that he had any kind of an ailment. He had a torticollis. That makes it embarrassing in public, to go out with friends and have them observe this condition. But, as far as concealing that fact, there was no attempt to do it, because he was able to do those things during the entire time, and there is no contention that he wasn't. And it isn't the fault of the plaintiff that he wasn't asked those things on examination. His deposition was taken, a very thorough, complete examination with the exception I don't think they went into the

jerking very extensively, other than that the lawyer for the railroad, it wasn't Mr. Welsh, Mr.—

Mr. Welsh: Moffat.

Mr. Werner: —Mr. Moffat made the observation that, "You seem to be jerking here, and is that a condition that resulted from this accident?" And he said, "Yes." And that is about all there was to it. [116]

The Court: What was the date of the deposition?

Mr. Werner: A couple of months before the trial, your Honor.

Mr. Welsh: March 7, 1956, your Honor.

Mr. Werner: There was an opportunity along with the testimony that the defendant could have had from the different employees, you would have to assume that they would have testified the same for the railroad that they did to us in making their affidavits. Here is a deposition taken two months prior to the time of trial. Now, let us assume, your Honor, that with the presence of Dr. Weaver, by the letters being written and the reference having been made to it in the deposition suggested certain circumstances that might be suspicious, don't you think the proper time to have done that would have been at the time of trial, with all of the information that we gave them? Not only that, as soon as I got a report from Dr. Goren, I think the records will show, I sent them a full, complete copy of the testimony of our doctors. Does that show an attempt to conceal or suppress evidence of any kind or that we weren't making a claim that the torticollis

existed? And I am sure that Mr. Welsh will find those reports of Dr. Goren right in his file at this time.

So, there we have Dr. Goren's report. I didn't make an affidavit of that, and if you object to me referring to it, [117] it probably could be stricken.

Mr. Welsh: You are.

Mr. Werner: What?

Mr. Welsh: I have no objection.

Mr. Werner: All right.

We have the report of Dr. Goren that was sent as soon as it was made and as soon as it was received by me, and we have the testimony in the deposition to the effect that this plaintiff first saw Dr. Weaver and then saw Dr. Goren, and that is the observation of the plaintiff himself at the time of the deposition.

If there was any suspicion by reason of Dr. Weaver's connection with the case, that should have been made an issue of at the time of the trial.

I don't think there is any conflict or decisions to the contrary in the Federal Courts, and I have cited nothing but Federal Court decisions, and I am not saying that respecting Federal Court decisions that say that Rule 60(b) is based upon Section 473, so I am not making any objection to your reference there, Mr. Welsh, at all—that these matters where either party is in possession of the facts upon which they could have raised them as an issue, that it should have been done at the time of trial before the Court or before the jury, and that would have been the only fair thing to the plaintiff, because we feel

that if an issue, that it would have made no [118] difference to a jury if the matter had been gone into in more detail and he had said that when he wasn't under stress, and now we have to draw the inference so that in that this was an emotional thing, that during times of stress, such as appearing before the Court, the torticollis was more intense than it would have been at times when he was not under stress. Also, we would have had an opportunity, and I would have had no fear of putting Dr. Weaver on the stand under the circumstances, to explain his position in the matter. Then, without leaving the thing open, it would have been unnecessary to have drawn any inferences.

I don't think there are enough facts to draw an inference of fraud, but at that time Mr. Welsh could have asked Dr. Weaver, "Well, what did you do, what if anything did you suggest to Dr. Goren?" or whether Dr. Weaver suggested anything to the plaintiff in the action, and we could have gone into all those facts. The only thing that would have come out was whether or not Dr. Weaver had been convicted of a felony, and I am not so sure, under the circumstances that he would have had to have answered yes or no. At least the Court would not have allowed the reading of the decision in 56 Cal. App. 2nd to have been read to the jury, and even though the Court would allow the question as to whether or not he had been convicted of a felony, and of course, he could have shown that he was pardoned of that crime, but, [119] that is one definite and clear rule that is laid down in the Federal Courts, is that on

those matters you can't try those things piecemeal, you can't let them run over to a motion of this kind, and when the facts were at hand, and then for the first time present them to the Court and expect the Court to retry the case on that issue that could have been tried before a jury.

I think I have covered everything, and I know I can't think of anything else at this time. I wanted to cover everything that was raised in the defendant's brief and his argument.

Thank you.

Mr. Welsh: If I may reply, sir.

The Court: Yes.

Mr. Welsh: It will be a short reply.

Mr. Werner, as the good counsel he is, had ready explanation for his client's vagary while he was testifying during the trial. But it is important to note that whereas at the time of the trial he was not only reluctant but unwilling to directly answer these questions about whether he did this all the time, as to whether he did this at all times or sometimes less, and to all those questions at that time he didn't know, he couldn't remember, the impression was that he had it all the time as far as he knew, but now he knows enough to put it in an affidavit that he goes between one to four hours [120] without twitching.

It is quite true that we had Mr. Porter Barrett examined by a physician of our choice, to whom he gave the same history as he gave to Dr. Goren, and I have here to introduce the affidavit of John B.

Doyle, M.D., which sets forth what Dr. Doyle communicated to the Santa Fe.

In talking about doctors, there is no question but what Mr. Werner permitted us to review some of his medical reports. We don't accuse Mr. Werner. We accuse his client of misrepresentation and other misconduct.

I am sure it was a slip of the tongue when Mr. Werner said that these other seven employees that filed affidavits said that they had seen this twitching from three months after the accident occurred. That is not a fact. The fact is that they say that they have several months ago. Now, this was in July. They are talking of 1956. They say several months ago they observed the man twitching. Well, several months ago could be December of 1955, when they are in July of 1956. There was an utter absence of any direct testimony or affidavits on the part of these employees as to when they observed the twitching.

Now, it is a perfectly conceivable and logical thing that a man will not remember the day or even the month in which some twitching occurred. He had no reason to make a mental note of it. However, he worked for the railway [121] company between May of 1955, and December of 1955, and it would have been very simple to have these employees state if in fact it were so, that they didn't remember the date but that they remembered that while he was still working for the railroad that they saw this jerking, but not one of these employees stated that he saw this jerking during the time Porter Bar-

rett worked for the railroad company. There was one remark which I don't think was intended.

Mr. Werner: I intended the last remark.

Mr. Welsh: An affidavit which says within three months?

Mr. Werner: "Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals," and there are several of them.

Mr. Welsh: But "several months," yes.

Mr. Werner: Several months, I think, would bring it right to June 7th.

Mr. Welsh: My point is, it is conceivable that the man might not remember the day or the month or even summer or winter, but it is inconceivable that he would not remember whether or not it was while he was working, and yet, not one affidavit indicates whether he saw he was jerking while he was working, and I think that is significant.

Now, insofar as subpoenaing of these employees was concerned, Mr. Werner knows the circumstances of that thoroughly. These men had requested of their employer, the [122] Santa Fe, if the Santa Fe would pay their salary to testify. The Santa Fe and the men have a Union agreement. One of the men went down to inquire, and they said, "Do we have to come?" And the lawyer wrote and said in his opinion the subpoenas were not valid. I discussed it with Mr. Werner. I suggested to him that if he would pay them, they wouldn't lose any money from their work, they would come. Now, that is the story about their witnesses they didn't put on.

Now, this is a case under the Federal Employers Liability Act. Perhaps the railroad doesn't deserve any help from its employees, but it certainly doesn't get any. There isn't any reason for the railroad to assume that every case is a case for "FBI Investigation," there isn't any reason for them to assume that there are misrepresentations and other misconduct on the part of the employee. It has very seldom happened. Your Honor has tried a lot of these railroad accident cases. You know that it is not often that an employee comes in and either lies or so grossly exaggerates as to make a thing entirely different than from what it was. I suppose it is natural for all of us to favor ourselves and our side of the case, but it is not very often that there is testimony of that ilk, of which we contend there is here.

Dr. Weaver did write a letter to the Santa Fe, but just as it was, there was no reason for the Santa Fe to believe that this was something which required investigation at that [123] time. Dr. Weaver could have written or Mr. Jones could have written to the Santa Fe, and although it isn't in the record, just for Counsel's information, I will tell you that it was Mr. Stein of the Stein Investigation Agency who said, "Dr. Weaver, that name rings a bell, I think he has been in trouble," and it was from there on that we began to find out about Dr. Weaver's past, so that the fact that we knew Dr. Weaver was in the picture at the time this case was tried has nothing to do with this motion.

And we don't contend that Dr. Weaver's situation in and of itself is determinative of anything.

We contend simply, therefore, that the man testified he jerked all the time, he did jerk all the time, whenever he was in the presence of any of the defendant's representatives or the court or at his deposition. And then afterwards, he doesn't jerk and he says in his affidavit he is free from it from one to four hours. Then when you combine these circumstances with the suspicious factors, including the participation of Dr. Weaver, it is cause for grave suspicion. But the actual fact is what he did during the trial and before, and what he did after the trial was over.

Mr. Werner very lightly goes over this deposition. He said we didn't go into this very much in detail, and that isn't true. These were questions asked by the counsel for the Santa Fe when the deposition was taken, page 43: [124]

“Q. And I have noticed during the questioning of you that you have been twitching your head or your head has been twitching. When did that first begin? A. Oh, about May, 1955.

“Q. Your head has been twitching almost continuously through this questioning. Has it been that way since May? A. Yes, sir.

“Q. Does it twitch all the time?

“A. Yes, very seldom without it.

“Q. Can you control it? A. No, sir.

“Q. Was your head twitching as it is now when you visited these doctors in Chicago in April of 1955? A. No, it hadn't started then.

“Q. It started some time in May and has continued all the time? A. That’s right, sir.

“Q. It is my impression that this twitching occurs every few seconds almost, is that the way it has been? A. That’s right.”

Now, I ask your Honor if this is consistent with what evidence he has now filed and what we have seen here this afternoon?

Mr. Werner: I just want to call the Court’s attention [125] to these affidavits on that.

The Court: You have, if all you are going to do is repeat. Frankly, I don’t think there was much to it as far as the argument of either one of you with respect to the affidavits. You pointed out that in the affidavits they say that they first noticed the jerking several months after the accident occurred, and I don’t know what that means, if anything.

Mr. Welsh points out, well, several months might mean any time, and, of course, it might mean two months, and it might mean a year, but I don’t see the importance of that.

Of course the fact remains that the burden rests upon the defendant with respect to this motion.

I do not sit here for the purpose of weighing evidence for the purpose of determining whether or not the plaintiff is entitled to recover in the case. That is not my function in the hearing of a motion such as this, and I will be candid to say that there are some strange things in it, the thing that caused you to become suspicious, the connection of Dr. Weaver, the mere fact that he is in the picture that there is some suspicion, but, of course,

that is only suspicion. It might merely be a coincidence that he happened to be in the picture.

If the jury were trying the case today and weighing the evidence and had everything presented to them that we have [126] at this time, assuming that that were possible, I am not sure that they wouldn't come in with the same verdict that they came in with before.

Now, here is another thing that seems so strange to me: You have introduced here this affidavit of Dr. Doyle, and it includes his statement following his examination, which he furnished you last April, after his examination, and to show you how accurate he was, or at least what has occurred here could very well fit in exactly with what he forecast, he said:

"From these data it would appear that as a result of the accident of February 11, 1955, the patient sustained a contusion of the scalp without losing consciousness. The evolution of his symptoms was gradual and unquestionably was aggravated by resentment toward an official in the Commissary Department of the Railway of Chicago. The clinical picture is not that of spasmodic torticollis but rather of habit spasms."

In other words, your doctor told you that to start with, that it was not torticollis, but rather a habit spasm. He said:

"In my opinion Mr. Barrett's symptoms are due entirely to mental causes. In this case settlement of litigation may be expected to be followed by his prompt recovery." [127]

In other words, your own doctor, who did not come in and testify, you didn't put him on the stand, if he had come in and testified, he would have told the jury that, and if he told the jury that, it could very well have been the jurors would have felt that, "This may disappear," and, as a matter of fact, if you then showed the jurors these pictures, and assuming that they felt that there was no twitching or even if he wasn't twitching at all today, they could very well say, "Well, that is not inconsistent with the testimony of the doctor."

Mr. Welsh: May I explain that, if your Honor please?

The Court: And, as a matter of fact, although I don't recall exactly without reading it, my recollection is that Dr. Goren was questioned in that connection. I think you in cross-examination asked Dr. Goren if it might not be habit spasm.

Mr. Welsh: That is right, I did say that.

The Court: And I think that Dr. Goren said they might be. I am still not satisfied. Assuming I have to pass on that question, I am still not satisfied that the jury wouldn't believe it, what that evidently turned out to be, habit spasms; that if the jury had the evidence presented to them, the evidence that was presented to me this afternoon, and if the jury believed that he no longer had those, the jury might very well conclude, well, they were habit spasms and [128] this Dr. Doyle has indicated they were caused by his mental processes; so maybe we gave him too much money, but there isn't any fraud or misrepresentation.

In other words, if you had put Dr. Doyle on the stand and Dr. Doyle had testified to this as he states here and you had Dr. Goren's testimony, it might very well be that the jury would sit there and say, "Well, if Dr. Goren is right and he anticipates that this will last for a long time, it is worth \$12,000.00; and if Dr. Goren is not right and Doyle is right, it isn't worth \$12,000.00, it is perhaps only worth \$5,000.00." Now, it could very well be that that would pass through the minds of the jurors. But the jurors conclude that they believe Goren, and so they give him a verdict for \$12,000.00 and they know at the time that it may develop that it won't last that long, they just use their judgment in trying to figure how long it will last, how badly he was damaged, and it develops that he wasn't as badly damaged as he thought he would be; in other words, assuming, as I say, that you did produce the evidence here that clearly shows that he no longer had a twitch at all, and I am not satisfied that the showing does show that he no longer has a twitch, but even if it shows that he no longer has that twitch, it would be, as I say, consistent with this, and my recollection is of Dr. Goren's testimony on cross-examination, that he left that open. He said it might be, or words to that effect, but in [129] his opinion it would last for a long time.

Mr. Welsh: If I may, sir, I would just like to explain.

The Court: Yes.

Mr. Welsh: The other doctor, I forget his name——

Mr. Werner: Heifetz.

Mr. Welsh: —Dr. Heifetz said quite frankly that it was all mental, psychological, but Dr. Heifetz and Dr. Goren both said that the etiology of the mental aberration was the blow on the head. And Dr. Doyle thought otherwise.

Your Honor has had a great deal more experience than I have, but my experience is that one of the most potent weapons that a plaintiff has is a traumatic neurosis, which is what Dr. Heifetz admitted it was in fact, but Doyle said it was just a neurosis, period, he wouldn't say it was traumatic. But this traumatic neurosis is the most difficult thing. Everyone admits it was neurosis. So it is just a question of whether it was traumatic in origin.

So, in my opinion I would not have gained anything by putting Dr. Doyle on the stand except he would have testified the blow didn't do it, it was something else.

When you imply a man is faking and you can't prove it, it is a very dangerous thing to do at any time, any place, and especially before the jury.

The Court: Of course, I am not indicating, Mr. Welsh, nor am I critical of the manner in which you tried this case, [130] that you should have.

Mr. Welsh: No.

The Court: I am not saying that you should have. The fact is that you didn't attempt to convince the jury that this was in fact a habit spasm and it wouldn't last very long.

Mr. Welsh: Yes.

The Court: In other words, while you might not have said it, you in effect tried to convince the jury

that reading between the lines as far as a medical testimony is concerned, the probability is that this man's jerking would stop as soon as he was in a more peaceful atmosphere, and, of course, you may have been right.

Mr. Welsh: Apparently.

The Court: You may have been right. If you were right, then, of course, he would now no longer have it. But the jury believed that it would be of a more permanent character, or apparently they believed that, because they believed that he was entitled to \$12,500.00.

The motion is denied.

Mr. Werner, you will prepare, serve and lodge a formal order in accordance with Local Rule 7.

[Endorsed]: Filed November 7, 1956. [131]

United States District Court, Southern District of
California, Central Division
No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

DEPOSITION OF PORTER BARRETT

called as a witness by the defendant on Wednesday,
March 7th, 1956, beginning at the hour of 9:30

(Deposition of Porter Barrett.)

o'clock a.m., at Room 620, 215 West Seventh Street, Los Angeles, California, before E. S. Brink, Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For the Plaintiff:

ERWIN P. WERNER.

For the Defendant:

ROBERT W. WALKER, and

HENRY M. MOFFAT, by

HENRY M. MOFFAT.

PORTER BARRETT

the plaintiff herein, called as a witness by the defendant, being first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

By Mr. Moffat:

Let me propose the following stipulation, Mr. Werner, that the deposition of Mr. Barrett is being taken pursuant to oral stipulation between the parties hereto in accordance with the provisions of Section 2021, subsection 1 of the Code of Civil Procedure and Section 2055, that all objections as to the form or manner in which the questions are asked are reserved until the time of trial and likewise all motions to strike are reserved to the time of trial; thirdly, that the deposition may be signed before any Notary Public, and, finally, that if the

(Deposition of Porter Barrett.)

deposition is not signed at the time of trial, provided the witness has had a reasonable opportunity to read, sign, and correct same, it may be used with the same force and effect as if signed.

Mr. Werner: I think that is a very reasonable stipulation.

Mr. Moffat: Thank you, sir.

Q. Your full name is what, sir?

A. Porter Barrett.

Q. Where do you live, Mr. Barrett? [2*]

A. 7441½ East 32nd Street.

Q. It is in the City of Los Angeles?

A. Right.

Q. What is your age? A. 43.

Q. Mr. Barrett, you know undoubtedly that because you filed a lawsuit against the Santa Fe that we have this right and opportunity to ask you questions about the subject of that lawsuit?

A. Yes.

Q. I don't intend to ask you any tricky or clever questions but merely to find out what you know about the accident and how you are feeling, and so forth. As your counsel has undoubtedly told you, if you can answer the questions you should give an answer. If you don't know the answer to any of the questions that I ask you, simply state you don't know or anything else that you want and we will understand. You know that you have taken an oath now to tell the truth and the testimony that you are giving here today is just as solemn as

(Deposition of Porter Barrett.)

though you were testifying in court before the jury and judge. Now, if you don't understand any of the questions that I ask, Mr. Barrett, you indicate that you don't understand them, and I will try and rephrase them or repeat them so we will have an understanding then, you see. And if you don't indicate that you don't understand a [3] question then I will assume that everything I ask you you understand.

Now, have you understood everything I have told you, sir? A. I think I have.

Q. All right. Fine. How long have you lived at your present address?

A. Oh, I say a couple of months.

Q. A couple of months? A. Yes.

Q. Incidentally, will you keep your voice up in here, if you can? We are competing with a jack-hammer outside. And who do you live with, sir?

A. A boy friend of mine.

Q. What is his name? A. David Holmes.

Q. Where does he work?

A. Let's see, Air Base, Army Air Force some place out in Maywood. I don't know the address.

Q. The Air Force Depot probably in Maywood?

A. It could be.

Q. Now, where did you live, sir, just before you moved to your present address?

A. 2929 Van Buren Place.

Q. In Los Angeles? A. Yes. [4]

Q. And how long did you live at that address on Van Buren? A. Approximately two years.

Q. Yes. And who did you live with at that ad-

(Deposition of Porter Barrett.)

dress? A. I live alone.

Q. You lived alone? A. Yes.

Q. Are you married, incidentally?

A. Well, according to law, yes, but I am not together.

Q. You are separated from your wife?

A. Yes.

Q. What is your wife's name, sir?

A. Janivee.

Q. And where is she presently residing?

A. (Witness shakes head negatively.)

Q. You don't know? A. No.

Q. When did you last see her?

A. About '51.

Q. Do you have any children by that marriage?

A. Yes.

Q. And what are their names and their ages?

A. The boy is named Fenton. He must be about 22 now, I guess.

Q. Did you have a girl, too? [5] A. No.

Q. Just one child? A. Yes, by her, yes.

Q. Do you have a child by a previous marriage?

A. (Witness nods head affirmatively.)

Q. Can you tell me that youngster's name?

A. Shirley.

Q. What is her age?

A. Six or seven now, I guess, somewhere along there.

Q. What was your previous wife's name, sir?

A. Nellie.

(Deposition of Porter Barrett.)

Q. And where does she reside?

A. In the city here some place.

Q. Do you know what name she is using?

A. No.

Q. Do you know if she is using the name of Nellie Barrett?

A. No; she got married, I do know that. I don't know her name.

Q. Now, was Fenton born of the marriage between you and Nellie?

A. (Witness shakes head negatively.)

Q. He was born of the marriage between you and—what is it, your wife's name?

A. Janivee.

Q. Janivee. And Shirley is of what [6] marriage?

A. That is in between, if you want to know the truth.

Q. All right. Now, when you lived at the address on Van Buren you lived alone?

A. (Witness nods head affirmatively.)

Q. Is that right? A. That's right.

Q. When did you start to work for the Santa Fe, Mr. Barrett? A. 1946, May 8th.

Q. And when did you stop working for the Santa Fe?

A. I arrived here the 17th day of December, 1955, and I hasn't worked since.

Q. Between those two dates, May 8th, 1946, and December 17th, 1955, you worked continually for

(Deposition of Porter Barrett.)

the Santa Fe with the exception of layoffs, is that right? A. That's right.

Q. Now, the accident on the train happened on the 11th day of March, 1955, is that right?

A. As near as my memory serves me, yes.

Q. And it happened while you were in the kitchen of the dining car?

A. We call it the pantry, sir.

Q. The pantry. I see. That was train No. 17?

A. That's right.

Q. Westbound? [7]

A. (Witness nods head affirmatively.)

Q. Santa Fe Super Chief? A. Yes.

Q. How did the accident happen, Mr. Barrett?

A. Well, it was during the dinnertime, and we was fairly busy then and I was in a stooped-over position opening what we call them, chill boxes; in other words, known to you as ice boxes, to be more correct, so you understand what I am talking about. There were two doors, one way they had one door and the other way another door and it came together to a small strip. In other words, when the doors came together you couldn't see the strip, a little lap-over, you know. I was getting something, I don't recall what, but getting something and another waiter getting something. So when he got through before I did, he slammed this door and struck me in the head.

Q. Who was that other waiter?

A. His name is Al Williams.

Q. Does he have any nickname?

(Deposition of Porter Barrett.)

A. No, that is his full name, as far as I know.

Q. And on which side of you was he at the time of the accident?

A. Well, he would be to my right, the way I was standing he would be to my right.

Q. Would you have been facing, let's say, south, generally south at the time of the accident? [8]

A. No, I would be facing east, the direction in leaving Chicago we would head west and my face would be to the tail end of the train, which would be east.

Q. I see. But the chill box is located along one of the sides of the pantry, isn't it, rather than the end?

A. The chill boxes on the Super Chief is located, I would say, as I am facing you along like this, it would be the right-hand side of the train. As you walk into the pantry, I come in the door, just as I am coming in——

Q. Fine.

A. That would throw the chill boxes to my right.

Q. I see. As you walked into the pantry you would be walking toward the rear end of the train?

A. No, walking toward the head of the train.

Q. Walking toward the head of the train?

A. Yes.

Q. Excuse me. And the chill box as you walked into the pantry is on your right?

A. On my right, that's right.

Q. So if the train were going from east to west

(Deposition of Porter Barrett.)

the chill box then would be, let's say, on the north side of the train, wouldn't it?

A. Yes, that would be right, north, yes.

Q. Now Mr. Barrett, when you approached the chill [9] box did you open the door of the chill box to look for something? A. Yes.

Q. Well, at the time, sir, that you approached the chill box, and I imagine you had to bend down, didn't you?

A. Definitely stooped-over position, that's right.

Q. Well, as you approached the chill box and bent down you opened one of the doors?

A. Yes.

Q. Now, was that the door on the right-hand side of the chill box or the door on the left-hand side of the chill box?

A. I opened the chill box on the left-hand side. The other waiter opened the box door on the right-hand side.

Q. Now, had he already opened the door, sir, on the right-hand side at the time that you reached down and opened the door on the left-hand side?

A. I don't remember.

Q. You don't remember? A. No.

Q. Do you remember him being at the chill box when you opened the door on the left-hand side?

A. No, I don't. In a heck of a busy dinner like that it is very easy to forget. I won't say I was there first or he was there first, I wouldn't say. [10]

Q. You don't know?

A. I don't remember.

(Deposition of Porter Barrett.)

Q. Now, I take it then, sir, that your head was struck by the left-hand door of the chill box?

A. The right-hand door.

Q. The right-hand door?

A. The right-hand. I was looking in the left door, the left-hand door was my door and the right-hand door was his door.

Mr. Moffat: Would you read that answer?

(Last portion of record read.)

Mr. Werner: That is the right-hand as you were facing the box.

Mr. Moffat: Yes, that is our understanding.

Q. Well, now, Mr. Barrett, between the left-hand door and the right-hand door of this chill box there is a—I am trying to reach for the right word—a margin or strip of metal separating the two doors, isn't there? A. Right, sir.

Q. What is the approximate width of that?

A. An inch, I guess, I don't know. I really don't know.

Q. About an inch, maybe two inches?

A. No, I wouldn't say that much. I have never measured it so I don't know any estimate I would give, I would probably be way off. [11]

Q. I don't want you to guess on it.

Mr. Werner: It is there and it can be measured.

A. That's right.

Q. (By Mr. Moffat): What I want to know, Mr. Barrett, did your head strike the right-hand door of the chill box? A. No, it did not.

(Deposition of Porter Barrett.)

Q. Well, did the right-hand door of the chill box strike your head?

A. Through the action of the other man, he slammed the door against my head after he finished.

Q. Where was your head with reference to the strip of metal that divided the left-hand door of the chill box from the right-hand door at the time that the right-hand door struck your head?

A. As near as my memory can serve me, sir, if you are in a stooped-over position there is not enough metal to hardly tell the distance between the two doors, if you are in a stooped-over position, whatever door would slam would hit you on the head if you were in a stooped-over position, if anyone would slam either one of the doors and I was in a stooped-over position, my head undoubtedly, if this is the metal here, it was probably too far over in the closing of this other door.

Q. I see. At the time that you say your head was struck by the right-hand door of the chill box, were you looking into the right-hand side of the chill box? [12]

A. That I don't know. I know I was trying to get out something of the box. Therefore, the shelves, the two doors go all the way across in there, it is not a separated part.

Q. There is no partition between the two?

A. No, there is no partition between the right-hand door and inside the box, open the door and you can reach either side on these shelves, there is

(Deposition of Porter Barrett.)

no partition at this particular time. I don't know whether I was looking for something on either side, I don't know. I really don't know.

Q. So you can't tell us whether you were looking or reaching into the right-hand side of the chill box at the time your head was struck by the door?

A. As far as my memory serves, I was just merely looking for the object I wanted to get before I reached in to get it. I think I was just looking for it to make sure so I wouldn't spend too much time moving things, I was looking in to see if I could see it, if I could reach in and get it, and that was all over with, see.

Q. When did you first become aware there was another waiter, this waiter named Al Williams, standing or kneeling beside you at the chill box?

A. As I stated a moment ago, I don't know whether he was there or was I there first. At a heck of a busy dinner there you get all confused and everybody is pushing, [13] shoving, in a hurry trying to get the service out. Truthfully I don't know.

Q. You don't know. All right. Did you hear him say anything to you before the accident?

A. No, I didn't.

Q. Did you say anything to him, sir, before the accident?

A. I would say no, I don't know.

Q. Well, just immediately before the accident,

(Deposition of Porter Barrett.)

Mr. Barrett, did you see him beside you working or looking into that right-hand side of the chill box?

A. Shall I use the phrase for that, sir, we call it in serving dinners and any meal, we use the phrase "up tree." Everybody is so busy, he's trying to think of one thing.

Q. You answer this question, if you can.

A. I don't remember.

Q. I know there are a lot of details in your job. I want to know if you saw him there beside you. He would be roughly on your right-hand side, wouldn't he? A. That's right.

Q. I want to know if you saw him there, sir, just before the door struck your head.

A. I couldn't absolutely say it was Al Williams or anyone because there were seven or eight men in the pantry, and I was not looking directly in it, and I didn't [14] recognize him, that it was him slammed the door at that particular time, it could have been any waiter.

Q. Did you know that, sir, just before the accident there was a waiter working on the right-hand side of the chill box?

A. I know the door was open. I don't know who was working until after the accident and he hol-lered "Oh, I'm sorry," then I looked up and I saw who it was from a sitting position on the floor.

Q. You were in a sitting position on the floor at that time? A. Yes.

Q. To sum that up, and tell me if this is fair, you know that when you were working in the chill

(Deposition of Porter Barrett.)

box that the right-hand door of the chill box was open before the accident; that's correct, isn't it?

A. Yes, I believe it was. I am not——

Q. And you know someone was working at the right-hand side of the chill box, but you didn't know it was Al Williams until after the accident, is that correct?

A. It was possible I knew he was the one that slammed, he admitted he slammed the door on my head.

Q. You knew there was a waiter there working on the right-hand side, but you didn't know it was Al Williams until after the accident?

A. That's right. [15]

Q. Now, at the time of the accident, Mr. Barrett, or immediately before it, I take it there was no lurching or swaying or unusual motion of the train or the dining car in which you were riding; that's correct, isn't it?

A. Well, sir, getting aboard the train, I will answer your question, I never paid too much attention to the motion of the train, unless it is a severe jolt or something, like once I get on it and it gets in motion I am immune to it then.

Q. You are accustomed to the ordinary movements?

A. It would have to be something unusual for me to notice it.

Mr. Werner: What are you trying to say?

Q. (By Mr. Moffat): You didn't notice any unusual jolt or lurch or movement of the train?

(Deposition of Porter Barrett.)

A. No.

Q. At the time of the accident or immediately before? A. No.

Mr. Werner: All right.

Q. (By Mr. Moffat): So it is your belief that the cause of the accident was the door being closed while you had your head near it, isn't that right, rather than any motion of the train?

A. Yes, sir; that is my belief. Yes, sir.

Q. All right. Incidentally, you don't remember what object you were looking for in the chill box at the [16] time of the accident, do you?

A. If my memory serves me right, I was looking for some kind of steak sauce, I believe I was at that particular time.

Q. At the time of the accident, Mr. Barrett, were you in a kneeling position or squatting down or just bent over?

A. I was in a stooped-over position, sir.

Q. Can you stand up now and show us about——

A. Like this.

Q. You bent from the hips down?

A. That's right.

Q. Thank you. Was that about the same position that Mr. Williams had at the time of the accident? A. I wouldn't know, sir.

Q. Now, do you know, Mr. Barrett, what part of that right-hand chill box door struck your head?

A. I don't know what part, no. I would say it was the inside part of the door, but I don't know.

(Deposition of Porter Barrett.)

Q. You don't know whether it was the center of the inside part or——

A. No, I don't know.

Q. Or the edge? A. I don't know.

Q. Can you stand up, if you will, and let's say face to the north, the position you were in at the time of [17] the accident, and then point to the part of your head that was struck by the icebox door, or chill box door, rather?

A. Well, here, about in here, sir. This is where all the hair came out.

Mr. Moffat: Mr. Werner, can we stipulate the witness is indicating roughly the top right-hand side of his head?

Mr. Werner: Yes.

Mr. Moffat: I would say about the middle of the head.

A. That's right, sir.

Mr. Moffat: All right. Thank you.

Mr. Werner: You say that is where the hair came out?

A. Yes, sir, about as big as a silver dollar came out of there.

Mr. Moffat: I am correct, aren't I, Mr. Barrett, in assuming that the left side of your head didn't strike anything at the time of the accident?

A. The left side of my head?

Q. Yes, sir. I am referring from the top down to the jaw on the left side.

A. I know what you mean by the side, I know I was struck in about the center part of my head.

(Deposition of Porter Barrett.)

Q. Up here on top? A. Yes.

Q. Well, I was referring to the left-hand side of your head. For instance, I will face north. You indicated, [18] Mr. Barrett, that the chill box door struck you on top of the head about the middle.

A. Yes.

Q. I wanted to know if any part of the left side of your head struck anything at the time of the accident? A. I don't remember.

Q. Pardon? A. I don't remember.

Q. What did you do immediately after the door struck the top of your head?

A. Well, I don't think immediately after it happened, I think it taken me a few minutes to get my wits back together. I was sitting in the middle of the pantry the first thing and I remember the kids was wetting—putting on ice on my head.

Q. Did you get up after a few seconds?

A. Yes, I did.

Q. And did you say anything to Mr. Williams, the other waiter?

A. I probably did, but I don't think I would repeat it here.

Q. Well, you can repeat it if you want to.

A. The words that I used, I wouldn't repeat them.

Q. They were swear words, were they?

A. Oh, definitely.

Q. Did he say anything to you at that time? [19]

A. What he said I haven't the slightest idea. No doubt the man, he was the main fellow trying

(Deposition of Porter Barrett.)

to give me some aid, but what he say, I don't know. I think he said a lot of things that didn't make sense, probably did make sense, but I don't know what they were. I know the man could say he was sorry or something like that, but I don't know word for word what he said. I wouldn't have the slightest idea what he said or what I said, to tell you the truth. I know I used a lot of profane language at the time it happened. What the words were, I wouldn't know myself right now.

Q. Then you put an ice pack on your head, is that it?

A. No, I didn't. Some of the other fellows did.

Q. How did your head feel right after the accident?

A. Well, how would a bump on the head feel? I know it was bleeding and they were trying to stop the blood from flowing, for one thing.

Q. Did the blood come down over your face?

A. No, it just got mangled all in my hair.

Q. Did it get on your clothing?

A. Yes, a little got on my jacket. Yes, I had to change jackets.

Q. Well, did you continue serving the party in the diner that you were serving?

A. No, another waiter finished the party that I was serving. [20]

Q. You stayed in the pantry, I imagine?

A. Yes.

Q. And continued to put ice on your head?

A. That is correct.

(Deposition of Porter Barrett.)

Q. All right. Did you serve any people in the diner after the accident?

A. Yes, sir; I finished dinner.

Q. What time did the accident happen, do you recall?

A. Oh, I would say about 8:30, something like that. It takes, it's just out of Joliet, it takes us about half an hour or forty-five minutes, it was about 8:45, something like that. It takes about forty-five minutes to run from Chicago to Joliet, so it happened just west of Joliet, so 8:30, quarter to nine, something like that.

Q. That was in the evening, wasn't it?

A. Yes, sir.

Q. The train was just a little bit west of Joliet?

A. That's right, sir.

Q. That is Joliet, Illinois, isn't it?

A. That's right, sir.

Q. Well, let's see, after the accident you took a rest in the pantry for what, fifteen minutes or so, and then you went out and finished serving; is that about right?

A. Yes, sir; I finished serving dinner.

Q. Dinner would be over about 10:00 o'clock at night, something like that? [21]

A. On the Super Chief, sir, sometimes we are just getting started.

Q. Sometimes you go to midnight, I imagine?

A. Oh, definitely. That particular night I don't know, maybe we got through by the 12:00 o'clock time because I know we had a very big load that

(Deposition of Porter Barrett.)

night and I would say dinner was over at 11:00 o'clock, somewhere around there.

Q. What did you do after you had finished serving dinner?

A. We have side work to do, sir, and we do that. We have to put the car in order for the next morning and then we go to bed.

Q. Did you make a report of this incident to the steward? A. Yes, sir; that night.

Q. That night? A. Yes, sir.

Q. He asked you questions about how it happened? A. Yes, sir.

Q. What was the steward's name?

A. Philip W. Krause.

Q. You answered his questions?

A. Yes, sir; I did.

Q. Did you fill out a report?

A. Yes, sir. [22]

Q. Was it that night? A. Yes, sir.

Q. Well, how were you feeling, Mr. Barrett, when you finished, let's say, your tour of duty that night and were getting ready to go to bed?

A. I don't know. I say I felt all right, only I had a little—my head felt sore.

Q. Yes. I imagine the bleeding had stopped?

A. Well, yes, they had a waiter aboard that had put a lot of salt in my head, something I had never known of to stop it from bleeding. It stopped bleeding.

Q. You didn't wear a bandage up there while you were serving tables?

(Deposition of Porter Barrett.)

A. No, they stopped the blood.

Q. Pretty soon after?

A. That seemed to be the only thing at that particular time, was to stop it. Of course, I couldn't wait table with blood on my head, even in my hair, and they got it all out with cold towels.

Q. Then you changed jackets and went out and served dinner, is that right? A. Yes, sir.

Q. Did you have a fair sleep that night?

A. Well, I don't know. It's been so long. I don't know how I rested. I probably had a pretty rough night, half the night I was taking Anacin and that is half [23] the doggone night, so I wouldn't say it was very restful.

Q. Well, you didn't ask the steward to get a doctor for you that night, did you?

A. No, I didn't, no.

Q. Let's see, the accident happened on March 11th at or near Joliet, Illinois. You had another day's work ahead of you, didn't you?

A. Yes, sir.

Q. You worked the following morning and the afternoon and so forth? A. Yes, sir.

Q. And, in other words, you worked your regular trip? A. That's right, sir.

Q. When would you have arrived in Los Angeles? A. The 13th.

Q. The 13th? A. 8:30 a.m.

Q. What did you do after you arrived in Los Angeles, Mr. Barrett, did you go home?

A. Yes, I did.

(Deposition of Porter Barrett.)

Q. And when did you next work?

A. The 14th.

Q. And on what train?

A. Super Chief No. 18 out of here.

Q. Eastbound? [24] A. That's right, sir.

Q. And when did you arrive in Chicago?

A. That would be on the 16th.

Q. Then did you lay off a day and then come back?

A. Layed off four nights and came back.

Q. Now, when did you first see a doctor after this accident?

A. I saw—I believe the first doctor I saw was 4-17, I believe. That would be April.

Q. The 17th, wouldn't it?

A. I am not so sure, I am not sure.

Q. You think it was April 17th?

A. I am not sure.

Q. Well, was it in the month of April? Let me ask this: Who was the doctor? Maybe that will help you establish the date in your mind.

A. The first doctor I saw was here in the City of Los Angeles. It was Dr. Bernard Jacobs.

Q. Now, remembering his name, does that help you establish the day or the approximate day that you went to see him?

A. Also the same day I went to him—now, if these dates are correct, I am not positive about these dates being correct, but I am sure the Santa Fe Hospital would have the same date, because the

(Deposition of Porter Barrett.)

same day I went to him I also went to Santa Fe Hospital. [25]

Q. Did you see Dr. Jacobs before you went to the Santa Fe Hospital?

A. I believe I did, yes. He recommended me to go to the hospital.

Q. Now, that doctor's name is Bernard Jacobs?

A. That's right, sir.

Q. And where does he practice?

A. In Los Angeles. I believe it 9300 South Central. I think it is somewhere, 92nd or 9300 south.

Q. And you think, and I know you don't want to be bound, but you think it was around April 17th?

A. No, that couldn't be right. No, it couldn't be right because I was in Chicago the 16th. Well, this is still March, though. This could be possible, this is another month. That date could have been just about correct, as near as my memory serves me.

Mr. Werner: He is asking if that is your best recollection.

Mr. Moffat: That's all. I understand sometimes these dates are difficult to remember. Could we put it this way, that it is your recollection that you saw Dr. Jacobs about a month or so, well, about a month, let's say, after the accident?

A. That's right, sir.

Q. And that the same day you saw Dr. Jacobs you also went to Santa Fe Hospital in Los Angeles? [26]

A. That's right, sir.

(Deposition of Porter Barrett.)

Q. All right. And why did you go to see Dr. Jacobs?

A. The only reason is he had been in my family a long time and I thought I would go out and see him because I had a feeling——

Mr. Werner: He wants to know your physical reason.

A. Well, the physical reason is because of my head, that is the reason I went there.

Mr. Werner: That's all he wants to know.

Mr. Moffat: What about your head was bothering you?

A. Yes, it was bothering me all along this time, I was still working but I had a headache and headache and I had been noticing that my hair was coming out from the injury that I had received in my head, it was a clog there and no hair wasn't coming out, and I would comb it and it would come out in big bunches.

Q. So you went to see Dr. Jacobs?

A. That's right.

Q. Dr. Jacobs was your family doctor?

A. Yes.

Q. He had treated you or—— A. No.

Q. Had you been to him on previous occasions before the accident? A. Yes, sir. [27]

Q. You told Dr. Jacobs, did you, about the accident and how you felt? A. That's right, sir.

Q. And did he treat you or examine you?

A. No, he just looked at my injury and recommended me what I should do, that I should go to

(Deposition of Porter Barrett.)

the hospital and have some X-rays taken of my head.

Q. He didn't take any X-rays himself?

A. No, he didn't.

Q. So you agreed it would be a good idea to go to the Santa Fe Hospital? A. Yes.

Q. Now, who did you see at the Santa Fe Hospital? A. I don't know his name, sir.

Q. It was a doctor? A. Yes, sir.

Q. Did you tell him about your complaints?

A. That's right, sir.

Q. Did you tell him that you had headaches?

A. Yes, sir.

Q. Was that the sole complaint you had at that time, Mr. Barrett? A. Yes, sir.

Q. Otherwise you felt okay?

A. That's right, sir.

Q. Did that doctor examine you? [28]

A. I am quite sure he did, yes.

Q. Did they take X-rays of you that day?

A. No, sir.

Q. What did that doctor tell you to do to help your condition?

A. He recommended me when I got back to Chicago to see a doctor back there.

Q. Was Chicago kind of your headquarters?

A. That's right. See, working as I was working at the time, my train headquarters was there which would automatically make me out of Chicago, although I lived here.

Q. You had more layover time in Chicago?

(Deposition of Porter Barrett.)

A. That's right, and my hospitalization was paid out on the West Coast to the East Coast. Therefore, they would only take an emergency out here. You had to be damn near dead before they would take you over here.

Q. Incidentally, did that doctor prescribe anything for you?

A. I know he wrote out a slip, sir, but the company has it some place. I haven't. Dr. Butee's office in Chicago, I don't know what he has.

Q. You don't recall telling him to take any medicine, or him giving you any medicine? A. No.

Q. Did you feel able to work, Mr. Barrett, at the time you saw this doctor at Santa Fe [29] Hospital?

A. Yes, I worked all along and taking Anacins and aspirins and Sal-fayne and Bufferins and what have you.

Q. When was it, Mr. Barrett, that you first had headaches after the accident, was it a week or two after the accident?

A. I don't think I was ever out of a headache after I had this accident, as far as my memory serves me.

Q. You had them the day following the accident? A. That's right.

Q. Well, in that month after the accident or up until the time that you saw Dr. Jacobs and this doctor at the Santa Fe Hospital, did you have headaches every day? A. Yes, sir.

(Deposition of Porter Barrett.)

Q. They were relieved somewhat by the Anacin and aspirin, I imagine?

A. For a little while, yes.

Q. Did you complain to any of the Santa Fe people such as the steward or your fellow waiters about these headaches?

A. Oh, yes. In fact, one of the waiters recommended the Sal-fayne to me which I had never heard of for headaches.

Mr. Werner: Who recommended that?

A. One of the waiters.

Mr. Werner: One of the waiters. [30]

Mr. Moffat: Did you during that period of time I just referred to ever complain to the steward about these headaches?

A. Oh, definitely, yes.

Q. That was the same steward, Mr.—

A. No, the same steward with me for approximately three trips during this time, which was about a month.

Q. Yes.

A. From the time I had this accident, yes, he was with me all this time.

Q. That is Mr.— A. Krause.

Q. Mr. Krause? A. That's right.

Q. You complained to him about your headaches?

A. Yes, and he advised me to go see a doctor, take off, what the heck, keep running up and down these roads here with headaches like you have, some time you might pass. Why don't you take off and

(Deposition of Porter Barrett.)

go see the doctor? I said there was nothing to it, I didn't know too much about it, you know, so I continued working and arrived in Chicago on April 22nd, if my memory serves me right, I went to see Henry B. Matthews, company doctor there in Chicago.

Q. How did you happen to see him, were you recommended to him or—— [31]

A. Well, no, sir, you go there to the commissary and you ask for a slip to see a doctor, you put the doctor you'd like to go to. He was close to the hotel I was stopping at so I said "I will go to Dr. Matthews," which was a couple of blocks from where I was stopping. It was more convenient for me.

Q. Did you know Dr. Matthews? A. Yes.

Q. You had seen him on some occasion previous, I imagine?

A. That's right, sir. And he examined my head which was completely bald then. And he also gave me a prescription to buy some kind of a salve, I don't have it in my pocket, but I still have it. It is a jar about the size of this to use and he also gave me a written slip to give to my employers, there in the commissary, Mr. Ford.

Q. Yes.

A. To be admitted to Topeka Hospital in Topeka, Kansas.

Q. Excuse me, for interrupting, but is Dr. Matthews a local surgeon for the Santa Fe?

A. I don't know what his standard is. His name

(Deposition of Porter Barrett.)

is on the rostrum, that's all I know.

Q. Did Dr. Matthews take X-rays of you?

A. No, sir; he didn't. [32]

Mr. Werner: Did you say yes or no?

A. No, he did not.

Mr. Moffat: Did he tell you that you had some skin infection there or skin trouble where you were losing your hair?

A. He told me that should have been opened, there was a lot of dead blood in there from an injury like that I received, and I should have surgery to open it and get this clogged-up blood that was still left in there. He said that is the reason my hair wasn't coming out.

Q. Now, was the next doctor you saw someone at the Topeka Hospital?

A. I never got to Topeka Hospital, sir. I taken this slip this doctor had gave me to Mr. Ford to the commissary to get transportation to go to Topeka.

Q. Who is Mr. Ford, is he the boss at the commissary?

A. Well, no, he's more like—his particular title, somethink like a counsellor. You go to him with all your troubles. What his position is——

Q. You don't know? A. I don't know.

Q. Well, anyway, you took the slip to Mr. Ford?

A. Yes.

Q. And what happened then?

A. Well, I just explained to him I had saw [33] Dr. Matthews and he had advised me to be sent to

(Deposition of Porter Barrett.)

Topeka Hospital for X-rays. And, well, he say I don't know why you have to go to Topeka. We have good doctors here in Chicago. I said, "Okeh, send me to some of them. What I want to know is what is causing this pain in my head."

Q. Keep your voice up.

A. I wanted to know what is wrong with my head. I said that I think I have the right to hospitalization, I would like to go to somebody who could do something for me.

Q. So did you go to see a doctor in Chicago?

A. Yes, he sent me back—overruled this doctor, wouldn't let me go to Topeka, he overruled this doctor's order that he had gave me to go to Topeka and to be examined and X-rayed, and sent me back to a company doctor, Dr. Butee's.

Q. Where was Dr. Butee's office?

A. He is located at Cermak and Indiana, 2200 something.

Q. He was a Santa Fe doctor?

A. Regular Santa Fe monthly examination doctor, he gives all the regular examinations.

Q. And what day did you go to see Dr. Butee, do you recall?

A. In April, the 22nd or 23rd, somewhere along in there, some date. I don't know the first date. [34]

Q. It was a day or so after seeing Mr. Ford?

A. Yes, sir; I probably could have gone the same day, but I don't remember whether I went the same day or not.

Q. Did Dr. Butee examine you?

(Deposition of Porter Barrett.)

A. That's right.

Q. You told him about your headaches?

A. Yes, sir.

Q. And at that time the only thing bothering you was your headaches? A. That's right.

Q. Did he take X-rays of you?

A. Yes, sir.

Q. And did he recommend that you follow any certain course of treatment?

A. Dr. Butee, that's all he done, that's all. He hadn't told me anything about the X-rays, nothing about the examination, nothing.

Q. At the time you saw Dr. Butee what was the condition of the top of your head, if you know, was your hair missing? A. Yes, sir.

Q. How big, about the size of a silver dollar, I think you said? A. That's right, sir.

Q. Now, did you see Dr. Butee again after that visit? [35] A. No, sir; I didn't.

Q. You continued working?

A. No, sir. I saw another doctor. In fact, I saw two other doctors after that.

Q. Was that at the same time?

A. During the same month, I don't know.

Q. The latter part of April?

A. Yes, in through May I saw doctors.

Q. All right. Tell me about those doctors, who they were, and so forth.

A. Well, to be truthful, I can't recall either one of them's names, but the addresses were 105 South LaSalle in downtown Chicago.

(Deposition of Porter Barrett.)

Q. Yes?

A. And he was an E.N.T. doctor. And another doctor at 104, I believe, South Michigan.

Q. Yes? A. He was an eye doctor.

Q. I see. Dr. Butee, did he send you to those fellows?

A. No, Mr. Ford sent me to those fellows.

Q. Did those doctors examine you?

A. Yes, they cleaned out my ears and my nose.

Q. Were you having some trouble with your ears at that time?

A. Not that I could recall. [36]

Q. How about your nose?

A. It never bothered me that I could tell.

Q. Were you having any sinus trouble?

A. He said I had a little, but I never noticed it.

Q. That was the E.N.T. man? A. Yes.

Q. How about your eyes?

A. He checked my eyes and all. I never saw no report or anything. I worked all along and he never told me anything.

Q. As far as you know, your eyes were all right, they weren't giving you any trouble?

A. No, this right one, yes, the right eye was giving me a little trouble after the accident.

Q. What kind of trouble was that?

A. Well, clog up, you know, with gummy stuff, you know, in the mornings and blurry like, I couldn't hardly see.

Q. Some kind of a substance in your right eye?

A. Yes.

(Deposition of Porter Barrett.)

Q. You could clean that out with a washcloth?

A. Yes, and I would use this stuff you buy at the drug store and wash it out with a cup, wash it out.

Q. When did you first notice that you were having this trouble with your eye?

A. Oh, I don't know, along the time I started going [37] to the doctors. That is the reason I asked to go to an eye doctor.

Q. About the latter half of April, is that right?

A. That's right.

Q. Did your eye clear up all right?

A. Well, I don't know. It still sticks together when I am up in the mornings, early in the mornings, and seems to be blurry like, but I don't know whether there is anything wrong with it or not.

Q. Did you tell the eye doctor in Chicago about this trouble?

A. Yes. He gave me a little tube of salve to use, you know, that's all.

Q. You say, sir, that you still have that substance in your eye each morning when you wake up?

A. That's right.

Q. Now, after seeing those two doctors, the eye doctor and the E.N.T. doctor, we have just talked about, Mr. Barrett, I imagine you went back to work or, as a matter of fact, you were probably working all the time?

A. I never stopped work. I continued to work all along. No one recommended me any relief or

(Deposition of Porter Barrett.)

anything. They just said come back tomorrow, come back tomorrow, and that was about the size of it.

Q. Then after those visits in April to those doctors, when was the next time that you saw a [38] doctor?

A. I don't believe I saw a doctor until the 17th of December.

Q. When you got off the train in Los Angeles?

A. That's right, sir.

Q. Well, how did you feel, Mr. Barrett, between that last part of April when you saw those two doctors in Chicago we have just referred to and the 17th of December, 1955?

A. Continual headaches all the time, never without them.

Q. Didn't you feel better during that time? Didn't the headaches diminish?

A. The only relief was to take Sal-fayne. That is the only relief and that was only for a little while and it would start all over again. In fact, I have one now.

Q. So who did you see on the 17th of December, 1955? A. Dr. Weaver.

Q. And what is his first name?

A. Darrington.

Q. Where is he located? A. 300—

Mr. Werner: 351 East 33rd Street.

A. 33rd Street.

Mr. Moffat: Los Angeles?

A. Yes. [39]

Q. Thank you. And why did you go see him?

(Deposition of Porter Barrett.)

A. To see if he could do anything for my headaches.

Q. Do you know if Dr. Weaver specializes in any particular field?

A. No, I never knew the doctor before then, no.

Q. And he examined you on December 17th?

A. No, I won't say he examined me, he just talked to me.

Q. Did he take X-rays of you that day?

A. No.

Q. And the only thing bothering you at that time, you still had the headaches?

A. That's right, sir.

Q. Well, what did he recommend?

A. He recommended me to another doctor.

Q. Who was that? A. Dr. Morris Goren.

Q. How do you spell that last name?

Mr. Werner: G-o-r-e-n, Morris.

Q. (By Mr. Moffat): Did you see Dr. Goren?

A. Yes, I am still seeing him, sir.

Q. When did you first start to see him, first visit him?

A. All during the holidays, somewhere along in there, I don't know the exact date. I can't remember.

Q. Did you see Dr. Weaver more than once or just [40] that time?

A. Yes, sir; I saw him more than once.

Q. Did you see him a couple of times before you went to this Dr. Goren?

(Deposition of Porter Barrett.)

A. Oh, yes, I go about three or four times a week.

Q. Well, do I understand this, Mr. Barrett, that Dr. Weaver treated you at the same time that Dr. Goren was treating you?

A. No, he never treated me for anything. He only talked to me. Well, you call this consultation, he sit and talked to me, it seemed to kind of relieve my thoughts and head and mind. Actually, he never gave me a pill.

Q. I see. So, in any event, within a few days after first seeing Dr. Weaver you went to see Dr. Goren? A. That's right, sir.

Q. Where is he located in Los Angeles, do you know?

Mr. Werner: Who?

Mr. Moffat: Dr. Goren. Maybe you can tell us, Mr. Barrett.

Mr. Werner: He is up on the corner—he is the first medical building on 6th Street, the left-hand side of the corner on top of the hill across from that girls' YMCA, you know.

Mr. Moffat: I don't know the location.

A. 1000 block west, I think. [41]

Mr. Werner: 1012, I think.

Q. (By Mr. Moffat): Something West 6th Street? A. Or 1212.

Q. When you first saw Dr. Goren did you tell him about your condition?

A. Yes, I did, sir.

Q. And he examined you? A. Yes, sir.

(Deposition of Porter Barrett.)

Q. Took X-rays? A. Yes, sir.

Q. And did you start a course of visits to his office?

A. Yes, sir, which I am still taking twice a week.

Q. Has it been pretty regularly twice a week?

A. Yes, sir.

Q. What treatment did he give you or has he given you?

A. After the X-rays he give me twice a week three different type of treatments, I take it twice a week. I took it three times. When I go there, on Tuesday and Friday, so I could have electrical treatments for my neck.

Q. Is that a heat therapy?

A. One of them is heat and one is electrical thing and the other is something you put around my head and draw me up something like this. I don't know what you call that.

Q. Has his treatment helped you? [42]

A. So far, sir, I don't see any change.

Q. I notice, and I have noticed during the questioning of you that you have been twitching your head or your head has been twitching. When did that first begin? A. Oh, about May, 1955.

Q. Your head has been twitching almost continuously through this questioning. Has it been that way since May? A. Yes, sir.

Q. Does it twitch all the time?

A. Yes, very seldom without it.

Q. Can you control it? A. No, sir.

Q. Was your head twitching as it is now when

(Deposition of Porter Barrett.)

you visited these doctors in Chicago in April of 1955? A. No, it hadn't started then.

Q. It started sometime in May and has continued all the time? A. That's right, sir.

Q. It is my impression that this twitching occurs every few seconds almost, is that the way it has been? A. That's right.

Q. You never had any discomfort, though, or pain in your neck, have you?

A. Oh, yes, sir, definitely. This right side of my neck is swollen now, it stays—he even gives [43] me shots in my neck.

Q. When did you first notice that?

A. Oh, sometime after I started this twitching I noticed my neck was swoll one morning.

Q. On the right-hand side? A. Yes, sir.

Q. Now, you have been off work since December 17th, 1955, is that right? A. Yes, sir.

Q. What have you been doing generally since that time? Have you taken another job?

A. No, not anything at all.

Q. Do you feel able to work?

A. I don't know. I worked all this time for the Santa Fe in this condition, so I don't know whether I could work or not.

Q. Have you ever been convicted of a felony?

A. Why you ask?

Q. Well, just my curiosity.

A. Yes, I have.

Q. Can you tell me when that was?

A. 1935.

(Deposition of Porter Barrett.)

Q. And where were you arrested?

A. Los Angeles here.

Q. By what police department?

A. Los Angeles, I imagine. [44]

Q. And were you using the name of Porter Barrett at that time? A. That's right.

Q. And what was the crime? A. A.D.W.

Mr. Werner: A what?

A. Assault with a deadly weapon.

Q. (By Mr. Moffat): And were you confined in a jail or prison or something for some period of time?

A. Awhile, yes.

Q. Can you tell me what institution you were confined in? A. Do I have to answer?

Mr. Werner: Yes, you have to answer it. Really you are only entitled to ask whether he has been convicted of a felony.

Mr. Moffat: Let me explain why I have asked these other questions. A felony sometimes is misunderstood and I have found, Mr. Werner, that sometimes men think they have been convicted of a felony and it wasn't a felony. I don't want to pry into his life. I hope you understand that.

Mr. Werner: Well, I will ask that the questions be limited then. You have enough information.

Mr. Moffat: Well, yes.

Mr. Werner: I ask that other than the answer of the [45] fact that he has been convicted be stricken from the record as incompetent, irrelevant and immaterial.

(Deposition of Porter Barrett.)

Mr. Moffat: Well, I won't agree to that, but your objection is certainly noted.

Mr. Werner: I think you are entitled to ask him whether he has been convicted of a felony. There is no doubt about that.

Mr. Moffat: Yes, I know that. I didn't want to pry. I have found sometimes that the crime was not a felony. That is why I was asking.

Q. Now, Mr. Barrett, you fractured your skull in 1954, didn't you? A. 1955, sir.

Q. Where did that take place?

A. Aboard the train.

Q. Didn't you fracture your skull in 1954?

A. No.

Q. Well, is it your testimony, sir, that you sustained no injury to your head in 1954 at all?

A. 1954?

Q. Yes. You can take a moment to think about it if you want.

Mr. Werner: I want you to answer this truthfully. If you were in another accident where you were injured, your head, I want you to be sure to reveal it here.

A. 1954? No, I haven't had no collision in [46] 1954.

Q. (By Mr. Moffat): Let me ask you this: Previous to this accident on March 11, 1955, had you ever suffered an injury to your head? A. No.

Q. Now, so we understand each other, I am asking you if you ever suffered an injury to your head of any kind prior to March 11, 1955, and I include

(Deposition of Porter Barrett.)

in that, Mr. Barrett, any injury whether it was on duty with the Santa Fe or while you were off duty?

A. I have never had any head injury before.

Mr. Werner: All right now. You understood that question? I don't care where it might have occurred. I want you to answer that correctly.

A. Prior to my injury aboard the train I have never had a lick in my head.

Mr. Werner: Never had?

A. No.

Mr. Werner: You are certain about that?

A. Definitely.

Mr. Werner: Well, it is very important to your case that you reveal it if it is true that you did have.

A. No, no, definitely not. I have no head injury prior to this.

Q. (By Mr. Moffat): Did you ever——

Mr. Werner: You don't mind my interrupting, because it is important to me. It would be a distinct surprise. [47]

A. Definitely not. I have never had any head injuries.

Mr. Werner: I want Mr. Barrett to know that the greatest danger from a question of that kind is not to reveal the truth.

A. Well, I have never had a head injury prior to this.

Mr. Werner: All right. As long as you understand it, and we are all agreed on this.

Q. (By Mr. Moffat): Now, prior to this acci-

(Deposition of Porter Barrett.)

dent of March 11, 1955, Mr. Barrett, had you ever had any difficulty with your right eye?

A. I don't recall, no.

Q. No difficulty at all? A. No, sir.

Mr. Werner: Well now, there again did you ever go to any doctor of the Santa Fe?

A. Yes.

Mr. Werner: Or any other doctor on account of your eye? I don't care whether there was a cinder in the eye—— A. Yes.

Mr. Werner: Oh, you don't have cinders any more, do you?

Mr. Moffat: Not supposed to.

Mr. Werner: Pardon me. Did you have them remove anything from your eye? [48]

A. Yes.

Mr. Werner: You have had that done?

A. This eye here, I don't know what you call it, at the Santa Fe Hospital.

Mr. Moffat: Keep your voice up.

A. Santa Fe Hospital has a record, they taken something off the lid of my eye.

Q. (By Mr. Moffat): You are indicating your left eye? A. Yes.

Mr. Werner: All right.

Q. (By Mr. Moffat): No difficulty with the right eye, though? A. Not that I remember, sir.

Q. Now, when did you have mumps?

A. I think in '54, wasn't it '54?

Q. You were hospitalized, weren't you, for

(Deposition of Porter Barrett.)

mumps? A. Yes, sir.

Q. At the Santa Fe Hospital in Los Angeles?

A. Well, through them into the County, yes. They don't have a County disease ward there. They put me in the County.

Q. That is the Los Angeles County Hospital?

A. That's right, sir.

Q. And did you have any after effects from the mumps, Mr. Barrett, after you had left the hospital? A. No after effects, no. [49]

Q. You know what I mean by after effects, did you have dizzy spells or headaches or pains of any kind? A. No.

Q. As far as you know you recovered completely? A. That's right.

Q. You had no complaints related to the mumps?

A. No, none at all.

Q. You had syphilis, did you not? A. No.

Q. You have never had syphilis? A. No.

Q. Have you ever been treated for any kind of a venereal disease?

A. No more than the mumps.

Q. Well, you say no more than the mumps. You mean you never have been treated for any venereal disease? A. No.

Mr. Werner: Did you get that answer? He shook his head.

Q. (By Mr. Moffat): As far as you know, you have never had a venereal disease such as syphilis?

A. No, sir.

Q. Well, for what illnesses did Dr. Bernard

(Deposition of Porter Barrett.)

Jacobs, your so-called family doctor, treat you before this accident of March 11th?

A. I don't think Dr. Jacobs gave me any kind of [50] treatments that I can remember. He just recommended me what I should do. He never treated.

Mr. Werner: He isn't referring particularly to this one visit. I think he is alluding to any other illness that he may have treated you for prior to this time. Is that correct, Mr. Moffat?

Mr. Moffat: Yes. I wanted to find——

A. I think I went for a cold, I went to him for a cold once, or virus X, whatever you call it, just a cold, and he gave me some penicillin shots.

Q. (By Mr. Moffat): Have you ever had any trouble with your knees?

A. Yes, I did. I had this—I don't remember what knee, I think the left knee. I was in the Santa Fe Hospital with it, oh, back in '48, I don't know, '49, some place back in there. I don't recall.

Q. What was the reason, did you have pain in your knee or did you have an injury to your knee?

A. No, no injury. It was just, I don't know, I got full of cold in Chicago, I put it down for cold, I stepped out of a cab and got snow all in my shoes and my sock got wet before I got to the hotel, and I just figured it was cold in my knee, but it begin to bother me a little bit so I went to Santa Fe Hospital. They treated me for it over there.

Q. (By Mr. Moffat): That is the Santa Fe Hospital [51] in Chicago?

A. No, here.

(Deposition of Porter Barrett.)

Q. In Los Angeles? A. Yes.

Q. Now, before this accident of March 11th, 1955, had you ever had headaches?

A. Oh, I think we all have a little headache now and then, but not consistent like I have.

Q. Nothing like the headaches you had after the accident?

A. No, I have them now and they have been with me ever since. I never did get up too much in the night before and have a headache, but I would take an Anacin or aspirin and it's all over with. But I have taken a drug store full of Anacin and, in fact, the doctor told me not to take any more.

Q. Have you ever received any treatment from a psychiatrist, Mr. Barrett?

A. I don't know. I have gone to another doctor, but I don't know what he was.

Q. Who was that doctor?

A. Dr. Goren sent me to another doctor out on Wilshire. I don't know what his title was.

Mr. Werner: He is a psychiatrist.

Mr. Moffat: He is a psychiatrist?

Mr. Werner: Yes. [52]

Q. (By Mr. Moffat): What is his name?

A. I don't remember.

Mr. Moffat: Can you tell us?

Mr. Werner: I don't know. Don't you know his name? Just a minute. Maybe I have it.

Mr. Moffat: Take a look and see.

A. I think Dr. Goren gave me a card for it the day I went out there, if I still have it.

(Deposition of Porter Barrett.)

Mr. Werner: Is this it, Milton D. Heifetz?

A. That sounds like it.

Mr. Werner: I have got a report here.

A. 63 something Wilshire Boulevard.

Mr. Werner: Yes, 6300 Wilshire Boulevard.

A. That's it.

Mr. Moffat: That is a big medical building out there.

Q. Are you still a member of the Santa Fe Coast Lines Hospital Association?

A. I would say no, sir, because my last work was out of the east, so they have a separate deal there that your dues are supposed to be paid from one end. In other words, if I am working out of Chicago I am supposed to pay my hospitalization there. This is the way I understand it, so I don't think that——

Q. You don't think you are a member out here?

A. No. [53]

Q. You think the reason is that your dues go through Chicago in some way?

A. That is what they explained to me out there, sir. I went up and talked to some fellow in the office and he explained to me by working on the Super Chief the lay-off is in Chicago, therefore, that made me a Chicago man and my dues were paid out through the east there and I wasn't entitled to any hospital association out here.

Q. Now, did you see any doctors or visit any hospitals between April, the latter part of April, 1955, and December 17th, 1955? A. No, sir.

(Deposition of Porter Barrett.)

Q. You worked steadily during that time?

A. I say the last doctors I saw was during the month through April and May there at 105 South La Salle in Chicago. This doctor, I don't recall his name, after I stopped going to him I didn't see any other doctors.

Q. All right. Are the headaches that you have had over these past months, Mr. Barrett, do they come for a while and go away or do they stay with you constantly?

A. I am never without them, sir.

Q. Never without them? A. No.

Q. How many visits have you made to this Dr. Heifetz out on Wilshire Boulevard? [54]

A. Once.

Q. Pardon? A. Just once.

Q. Did he give you any type of electric or insulin shock treatment? A. No.

Q. Now, in let's say the year preceding this accident, I mean the year before the accident of March 11, 1955, had you received medical treatment from any doctors aside from the mumps I think you mentioned in 1954?

A. I don't remember any. If it was, probably for a cold, something like that, nothing serious.

Q. And you have never injured your head in any fashion before this accident of March 11th?

A. No, sir.

Q. Now, have you ever filed a lawsuit for personal injuries to yourself prior to this suit?

A. Never in my life, sir.

(Deposition of Porter Barrett.)

Q. I take it, too, that you never filed a claim for personal injuries?

A. No, sir; nothing.

Q. And prior to this accident of March 11th, 1955, I take it you had never been in an accident where your body or your person had been injured, am I right?

Mr. Werner: Now, we want—I don't care what kind of accident it was, I want you to reveal any sort of [55] accident wherein you might have injured yourself. I don't care whether, if you can recall it, slipping on the floor or in the bathtub or——

A. No.

Mr. Werner: The harm of a question of that kind and answer is not to reveal the truth and that's all we want here. I am sure that's all Mr. Moffat wants.

A. If you consider, I had a piece of ice to fall on my foot.

Mr. Werner: Well, all right.

Q. (By Mr. Moffat): Did you hurt your foot?

A. I broke a little toe.

Q. Aside from that no other injuries?

A. No, sir.

Mr. Werner: You know a lot of people have accidents and all that is necessary is to reveal the truth now, no harm comes from that.

A. No.

Mr. Werner: Because we all have accidents of that nature.

Q. (By Mr. Moffat): Since you took off work

(Deposition of Porter Barrett.)

on December 17th, 1955, you stated, I think, that you had no other job? A. No, sir.

Q. Up to now, and I imagine you have received no other wages or money of that kind?

A. No. [56]

Mr. Moffat: I am sorry to be so long. I think I will be through in just a moment.

Mr. Werner: You just take your time.

Mr. Moffat: Thank you.

Mr. Werner: I came prepared to stay for the morning.

Q. (By Mr. Moffat): Do you feel nervous about yourself since the accident?

A. Well, sir, I don't know exactly how to put it, whether it would be nervous or lack of memory or something. I don't know, because a lot of times I would be laying something down right this minute and the next minute I don't know where I put it. I don't know whether you call that nervousness or lack of memory, I don't know.

Q. When did you separate from your wife? Oh, I think you told me, I am not certain. I don't want to ask the same question again. I have forgotten, though. Do you recall?

A. Oh, I am sorry. I didn't know——

Q. Do you recall the approximate time? I may have asked you this.

A. You did, sir. We separated in '50 or '49, something like that, I don't know.

Q. Have you ever been hospitalized in any hos-

(Deposition of Porter Barrett.)

pitals in Los Angeles other than the Santa Fe Hospital? A. Yes, sir.

Q. And the General Hospital? [57]

A. Good Samaritan up here on the hill, is that the Good Samaritan?

Mr. Werner: Yes, I think that is it.

A. Appendix removed.

Mr. Werner: You had a what?

A. Appendix.

Mr. Werner: At Santa Fe? A. No.

Q. (By Mr. Moffat): That was before you worked for Santa Fe? A. Yes.

Q. Aside from that, no other hospitalization?

A. No, sir.

Mr. Moffat: Well, I think that's all.

Mr. Werner: Well, just one question. I don't usually ask questions.

Cross-Examination

By Mr. Werner:

Q. You were asked whether you made a report to the steward. Did you at that time discuss the making of the report for the purpose of protecting this other employee? A. No.

Q. You didn't?

A. No, at that time just make out a regular—you see, they have a form, regular accident report. [58]

Q. Yes. What was the accident?

A. It doesn't cover——

(Deposition of Porter Barrett.)

Q. What?

A. It say how the accident happened, it's all that is supposed to be. I don't think his name was mentioned. I don't think his name was mentioned. I don't know, I really don't know whether his name was mentioned or not. I truthfully don't know, but the accident report was made out, whether his name was mentioned.

Q. Well, in that report was there anything said about the movement of the train?

A. I believe it was, yes.

Q. What was said?

A. I don't know what particular words he wrote down there but I think he did say that some motion of the train caused this door to close. I believe it was put in there.

Q. Did he say why he was putting that in there?

A. Yes.

Q. Why?

A. To try to protect this other fellow's job.

Mr. Werner: I just wanted that to come in so it wouldn't be an afterthought.

Mr. Moffat: There is always an afterthought. I might ask some on that. [59]

Redirect Examination

By Mr. Moffat:

Q. Did you read the report, sir, the accident report that Mr. Werner asked you about?

A. No, sir; I didn't read it.

(Deposition of Porter Barrett.)

Q. Did you sign the report?

A. Yes, sir. He asked questions and write down. He asked questions and he write and he asked questions and he write, but when he get through we were sitting now at a table and when we get through I just sign it. I couldn't read back the report. I knew a few questions he did ask me, how did it happen.

Q. Well, are you saying, Mr. Barrett, that the steward wouldn't let you read that report?

A. Oh, no, definitely not; no.

Q. You just didn't—

Mr. Werner: Take the trouble?

Mr. Moffat: Take the trouble to read it?

A. No, it is there for you to read, sir.

Q. Did you fill out a report in your own handwriting? A. No.

Q. And you say that the steward suggested that the report say that the accident happened because of the movement of the train, is that the steward's suggestion? A. Those are his words.

Q. Those are the steward's words? [60]

A. Yes.

Q. Can you tell me exactly what he said to you or as near as you can recall?

A. I won't say word by word. I can't tell you exactly, sir, no.

Q. Tell me in substance what you recall him saying to you about this aspect of the report.

A. Well, he asked me how did it happen and all that, the time, and all the procedure of the accident,

(Deposition of Porter Barrett.)

and what should we put down here how it happened. So——

Q. Let me interrupt you for a minute. Did you then tell him how it happened?

A. Definitely.

Q. Did you tell him the same version that you told us here today? A. Yes, he understood.

Q. What did he say to you?

A. If my memory serves me kind of right, I don't know correctly, it has been so long.

Q. I understand that.

A. He said should maybe—maybe we shouldn't put down that Al Williams slammed this door in your head because he might lose his job behind this, so we'll put down the swaying of the train caused the door to slam on your head. I said okeh, it don't matter to me, so the report is written up something like that. I really [61] don't know word for word, you know, what was said. And I just agreed to what he said. I was thinking, too, of this man's job at the same time.

Q. Who was Hog Head?

A. I beg your pardon?

Q. Who is Hog Head? Is that a nickname for anybody?

A. Hog Head is the engineer, as far as I know, on a train.

Q. That is the nickname for the engineer?

A. Yes.

Mr. Moffat: Do you have a question?

Mr. Werner: No, I don't think so.

Mr. Moffat: Thanks very much. I didn't mean to take so long.

/s/ PORTER BARRETT,
Witness. [62]

State of California,
County of Los Angeles—ss.

I, Wertie Clarice Weaver, Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That on the 18th day of April, 1956, before me personally appeared Porter Barrett, the witness whose deposition appears hereinbefore.

That the said witness was by me duly advised of the right to make such changes and corrections in the within transcript as might be necessary in order to render the same true and correct;

That the said witness stated to me that the said deposition had been read to or by him, and he, having made such changes and corrections as he desired thereupon, subscribed and swore to the said deposition in my presence;

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office the date hereinabove written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public in and for the County of Los Angeles, State of California. [63]

Certificate

State of California,
County of Los Angeles—ss.

I, E. S. Brink, Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That I am a Certified Shorthand Reporter, duly licensed and qualified by the State of California.

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify the truth, the whole truth and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place herein named and was thereafter reduced to type-writing under my direction.

That at the conclusion of the taking of said deposition it was stipulated by and between respective counsel herein that when reduced to writing, said deposition might be read over by the witness and if necessary, corrected and then signed before any duly qualified Notary Public, and if not signed by the witness, the deposition might be used with the same force and effect as though signed.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 14th day of March, 1956.

[Seal] /s/ E. S. BRINK,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 22, 1956. [64]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause;

A. The foregoing pages, numbered 1 to 93, inclusive, containing the original:

Verdict;

Judgment on Verdict;

Motion and Notice of Motion for Relief From Judgment;

Brief and Points and Authorities in Support of Motion for Relief From Judgment;

Affidavits of William Perry, George Franklin Richcreek, Joe Wilson Elliott, John G. Zelezny, Alice Madsen, Louis M. Welsh;

Brief and Affidavits against Motion for Relief From Judgment;

Affidavits of Arnold G. Roberts, Lemaud J. Nash, Rhodes Robinson, Walter Bozeman, Jesse Mitchel, Richard Goldsmith, Calvin Davis, Darrington Weaver, M.D., Porter Barrett;

Affidavit of John B. Doyle, M.D.;

Order on Defendant's Motion Under 60(b), F. R. C. P.;

Notice of Appeal;

Designation of Record on Appeal;

Application for Order to Extend Time for
Filing Record on Appeal and Order Thereon;

and a full, true and correct copy of Executive Department of the State of California Pardon;

B. Two volumes of Reporter's Official Transcript of Proceedings had on May 22, 1956, and September 10, 1956;

C. The deposition of Porter Barrett;

D. Defendant's exhibits 1 through 7, inclusive.

I further certify that my fees for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court this 5th day of November, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the supplemental transcript of record on

appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages, numbered 1 to 25, inclusive, containing the original:

Amended Complaint;

Answer to Amended Complaint;

Reply to Plaintiff's Opposition to Motion for Relief From Judgment;

Ex Parte Order to Stay Proceedings to Enforce Judgment;

Notice of Motion for Supersedeas;

Affidavit of Service of Ex Parte Order to Stay Proceedings to Enforce Judgment;

Order to Stay Proceedings to Enforce Judgment.

Witness my hand and seal of the said District Court this 7th day of December, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15348. United States Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellant, vs. Porter Barrett, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 6, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

1861

1. The first of the year was a very cold day, with a heavy frost, and a strong wind from the north.

2. The second day was a very cold day, with a heavy frost, and a strong wind from the north.

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25. The twenty-fifth day was a very cold day, with a heavy frost, and a strong wind from the north.

26. The twenty-sixth day was a very cold day, with a heavy frost, and a strong wind from the north.

27. The twenty-seventh day was a very cold day, with a heavy frost, and a strong wind from the north.

28. The twenty-eighth day was a very cold day, with a heavy frost, and a strong wind from the north.

29. The twenty-ninth day was a very cold day, with a heavy frost, and a strong wind from the north.

30. The thirtieth day was a very cold day, with a heavy frost, and a strong wind from the north.

31. The thirty-first day was a very cold day, with a heavy frost, and a strong wind from the north.

No. 15348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COM-
PANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

MAR 25 1957

PAUL P. O'BRIEN, CLERK



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No. 15348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTIONAL STATEMENT.

This action arose under the Federal Employers' Liability Act [45 U. S. C. A., Sec. 51, *et seq.*, R. pp. 4-6], and this appeal is prosecuted from the District Court's order denying appellant's motion under Rule 60(b), Federal Rules of Civil Procedure. The order denying relief was filed September 18, 1956 [R. p. 72], and appellant's notice of appeal therefrom was filed September 20, 1956 [R. p. 73]. Jurisdiction of the District Court is founded on Title 28, Section 1337, United States Code, and jurisdiction of this Court of Appeals is founded upon Title 28, Section 1291, United States Code. An order denying relief under Rule 60(b) is an appealable order (*Greenspahn v. Joseph Seagram* (C. A. 2d, 1951), 186 F. 2d 616; *Cromelin v. Markwalter* (C. A. 5, 1950), 181 F. 2d 948).

II.

STATEMENT OF THE CASE.

Appellee, Porter Barrett, filed this action to recover compensation for alleged injuries which he received on March 11, 1955, while he was working as a dining car waiter aboard the "Super Chief," a train owned and operated by appellant [R. p. 90]. Mr. Barrett testified that he was struck in the head by the door of a chill box; became dazed, but was not rendered unconscious; he experienced a sharp pain in the head but was able to complete his duties that evening [R. pp. 90-93]. The accident occurred the first night out of Chicago enroute to Los Angeles, but appellee finished his duties during the entire trip, and in fact continued to work without interruption for the next nine months, or to and including December 17, 1955 [R. p. 124].

For more than one month after the accident, Mr. Barrett did not seek care or treatment for his alleged injury. He first consulted a physician on April 17, 1955, [R. pp. 93, 113], and thereafter he saw several Santa Fe physicians during the months of April and May, 1955 [R. pp. 93-105]. Barrett received no further medical treatment or examinations from the end of May, 1955 until December 17, 1955 [R. p. 124]. At the trial his chief complaint was that of traumatic torticollis—a "tic" in the neck which caused him to continuously jerk his neck at intervals of approximately one each second [R. pp. 102, 103, 114, 123]. Barrett testified that he first experienced this jerking the end of May or the first of June, *after* he had stopped going to physicians [R. pp. 102, 124], and that the twitching had continued from that time to the present without change [R. p. 102].

During the months of June, July, August, September, October, November and December, 1955, Barrett worked each shift. He testified that his neck was twitching constantly; yet he sought no medical care or treatment [R. pp. 102, 124]. On December 17, 1955, approximately seven months after the onset of the torticollis, appellee sought the help of a physician and consulted Dr. Darrington Weaver [R. p. 45]. Dr. Weaver referred Mr. Barrett to Dr. Morris Goren, who testified at the trial that Barrett had "spasmodic torticollis" which "may last the rest of his life. It is a chronic condition." This testimony was based upon a history of twitching and tenderness of the head and neck from May, 1955 to December, 1955 [R. pp. 77-78].

Throughout the trial of this action, Mr. Barrett continuously twitched and jerked his neck. His testimony, both at the trial and during the taking of his deposition, was to the effect that he had no control over this torticollis, and that he twitched all the time; that he was "seldom without it." During the trial Mr. Barrett testified that the twitching condition had neither improved nor worsened; that he is unable to stop the twitching; and that he cannot say that at times it is not as great as others because he does not have any control over it and is not aware whether or not he is twitching [R. pp. 102, 125]. On his deposition Mr. Barrett stated that since May his head has been twitching almost continuously; that although it had not started when he was visiting the physicians in Chicago it started some time in May, and has continued all the time since then. *During that entire time the twitching has been occurring every few seconds* [R. pp. 219-220].

On the basis of what they heard and saw from Mr. Barrett, and the testimony of his physician (which was predicated upon the history given to him by Mr. Barrett) the jury returned a verdict in favor of appellee in the sum of \$12,500.00, and judgment thereon was entered [R. pp. 8-10].

Yet a few days after the trial was concluded, and a few weeks after the trial was concluded, Mr. Barrett drove his automobile, visited and talked with his friends, walked down the street, went shopping, and performed other natural functions, *without a trace of the twitch which was so evident during the trial* [R. pp. 13-25; Exs. 1 to 7, incl.]. All of this can be observed by the court by viewing the motion pictures which have been submitted into evidence and which are available for the court to review. Mr. Barrett was secretly observed by William Perry on May 26, 1956, and by G. F. Richcreek on May 28, 1956. Mr. Richcreek obtained motion pictures which were later introduced into evidence as Exhibits 1, 2 and 3. During the time that Mr. Perry observed appellee, he found that Barrett neither twitched nor contorted his head or neck, and that he at all times appeared to be normal [R. pp. 13-15]. Mr. Richcreek's observation, which is substantiated by the motion pictures, disclosed that for the first two hours that appellee was under observation he neither twitched, contorted, nor otherwise unnaturally moved his head or neck, but that thereafter he began to twitch, and went to the offices of Dr. Darrington Weaver, who accompanied him to the office of Dr. Morris Goren [R. pp. 15-19]. Subsequently, we learned that Mr. Barrett had discovered that he was under observation by Mr. Richcreek while the investigation was being conducted [R. p. 33].

Because we suspected that Barrett had observed Richcreek in the process of taking motion pictures, the investigation was discontinued. On June 20, 1956, Mr. Barrett called at the office of appellant's counsel for the purpose of delivering certain papers which were needed in order to prepare the draft in payment of the judgment. While he was at counsel's office, Barrett twitched and jerked his neck in exactly the same manner as he had done during the trial. But immediately after leaving the offices, he stood in the hallway waiting for the elevator and neither jerked, twitched, nor otherwise contorted his neck or head [R. pp. 27, 31-32].

On June 25 and June 26, 1956, under cover motion pictures of appellee were taken by Mr. Joe Wilson Elliott. These films have been introduced into evidence as Exhibits 4, 5, 6 and 7. The affidavit of Mr. Elliott and the motion pictures reveal that on June 25 and June 26, 1956, at all times during Mr. Elliott's observation, Barrett neither twitched, contorted, nor otherwise unnaturally moved his head, but that he walked, talked, drove his automobile and conducted other activities normally [R. pp. 19-25].

The circumstances which originally aroused the suspicion, and which resulted in the investigation of Mr. Barrett, was the unusual interest in the case displayed by Dr. Darrington Weaver. Dr. Weaver neither treated nor prescribed for the appellee [R. p. 218], yet he was present and conferred with plaintiff's counsel during the trial, although he did not serve as a witness in any capacity [R. pp. 28, 47].¹ After the judgment was rendered, Dr.

¹Note that Dr. Weaver states that he was “* * * ready to testify if called upon * * *”, but he does not state that he attended the trial for the purpose of giving testimony.

Weaver called at the office of appellant's counsel in order to personally deliver the satisfaction of judgment which had been executed before his wife, Clarice Weaver, a notary public. On another occasion Dr. Weaver telephoned appellant's counsel and urged that the payment of the judgment be expedited [R. pp. 28-31]. As a result of the unnatural interest of Dr. Weaver in the collection of the judgment, appellant investigated Dr. Weaver's background, and discovered that he had been convicted in 1942 on thirteen counts of violating Section 556 of the California Insurance Code,² one count of subornation of perjury, one count of perjury, and one count of forgery of a fictitious name—all in connection with the presentation of false claims to insurance companies for the purpose of obtaining compensation for persons who were not actually injured. It was also discovered that in 1931 Dr. Weaver had been convicted on five counts of violation of the California State Poison Act [R. pp. 62-71; *People v. Weaver*, 56 Cal. App. 2d 732].

Relying upon the evidence contained in the record on appeal and briefly outlined herein, appellant moved the District Court to vacate and set aside the judgment pursuant to the provisions of Rule 60(b), Federal Rules

²California Insurance Code, Section 556, provides:

"It is unlawful to:

- (a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.
- (b) Prepare, make, or subscribe any writing with intent to present or use the same, or to allow it to be presented or used, in support of any such claim."

of Civil Procedure, on the grounds that the judgment had been obtained by fraud, misrepresentation and other misconduct [R. p. 11]. Although the Honorable Trial Judge remarked “I will be candid to say that there are some strange things in it, the thing that caused you to become suspicious, the connection of Dr. Weaver, the mere fact that he is in the picture, that there is some suspicion * * *,” the motion was denied, and the Judge stated that he could not be sure that the jury would return a different verdict had these facts been presented to it.

III.

SPECIFICATION OF ERRORS.

1. The Honorable Trial Court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by appellee’s fraud, misrepresentation and other misconduct.
2. The Honorable Trial Court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by “other reasons” justifying relief from the operation of the judgment.
3. The Honorable Trial Court erred in denying appellant’s motion for relief from the judgment upon the grounds stated in said motion.
4. The Honorable Trial Court erred in that it applied the criteria for determining a motion for a new trial rather than the criteria established for determining a motion for relief from judgment under Rule 60(b), Federal Rules of Civil Procedure.

IV.

SUMMARY OF THE ARGUMENT.

- A. Judgments obtained through fraud, misrepresentation and other misconduct will be vacated.

Rule 60(b), *Federal Rules of Civil Procedure*.

- B. Rule 60(b) is remedial and should be liberally construed.

Moore's Federal Practice, Vol. 7, Sec. 60.24[5], pp. 253-254;

Tozer v. Krause, 289 F. 2d 242 (C. A. 3, 1951);

Bridoux v. Eastern Airlines, 214 F. 2d 207, 210 (C. A. D. C., 1954).

- C. Where perjury has played some part in influencing the court to render a judgment, the effect of the perjury will not be weighed on a motion to set aside the judgment.

Jungersen v. Axel Bros., Inc., 121 Fed. Supp. 712.

- D. The record discloses that the judgment in this case was obtained by fraud, misrepresentation or other misconduct of appellee in conspiracy with Dr. Weaver.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 88 L. Ed. 1250;

Rice v. Rice, 93 Cal. App. 2d 646;

Wood v. United States, 41 U. S. 342, 10 L. Ed. 987;

C. R. I. & P. Railway Co. v. Callicotte, 267 Fed. 799 (C. C. A. 8, 1920), *Cert. den.* 255 U. S. 570.

V.

ARGUMENT.

Rule 60(b) of the Federal Rules of Civil Procedure provides in part:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, * * * for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; * * * or (6) any other reason justifying relief from the operation of the judgment. * * *”

This rule is to be liberally construed. As stated by Professor Moore in *Moore's Federal Practice*, Vol. 7, Sec. 60.24[5], pp. 253-254:

“Because Rule 60(b) is remedial and to be construed liberally, and because of the comprehensive sweep of 60(b)(3) any fraud, misrepresentation, circumvention or other wrongful act of a party in obtaining a judgment so that it is inequitable for him to retain the benefit thereof, constitutes grounds for relief within the intendment of 60(b)(3).”

In *In re Cremidas' Estate*, 14 F. R. D. 15, 17, the court stated:

“Relief from judgments, orders, or other proceedings rests in the sound discretion of the court and that discretion should ordinarily incline towards granting, rather than denying relief.”

A. The Fraud, Misrepresentation and Other Misconduct of Appellee.

In order to provide the court with a quick means of viewing the evidence upon which we rely, we have set forth in Appendices A and B a diagrammatic representation of the conflicting acts and testimony of appellee which we contend establishes fraud, misrepresentation and other misconduct.

When Mr. Barrett's deposition was taken on March 7, 1956, his head was twitching almost continuously. Barrett said that it had been that way since May, 1955; that his head twitched all the time and he was seldom without the twitching. He denied his ability to control the twitching, and he testified that the twitching did not start until after he had finished seeing the physicians in Chicago [R. pp. 219-220].

At the trial Barrett testified that the neck jerking started the last of May or the first of June and that it has continued since that date without change [R. p. 102], but that he saw no physician for this condition until December, 1955 [R. p. 124]. Furthermore, throughout the proceedings while appellee sat at counsel table or on the witness stand before the jury, he contorted and twitched his neck with sudden, short jerks, all of which was visible to the court and the jury at all times.

Yet, after the jury verdict was returned, Barrett appeared completely normal and without any trace of the twitching or jerking except on those occasions when he knew he was being observed. This "sudden recovery" of Mr. Barrett is not mere coincidence. Barrett's fraudulent intent and motive are made clear when one considers that whenever Barrett knew he was being observed by

an agent or representative of the appellant railway company, he promptly reverted to the same twitching activity he had displayed during the trial, but when he thought he was no longer being observed, the twitching and other abnormalities promptly disappeared and he was again normal. Although Barrett jerked violently when he visited the office of appellant's counsel on June 20, 1956, he made a rapid recovery when he stepped into the hallway and walked down to the elevator [R. pp. 15-19, 28-34].

The close association and uncommon interest of Dr. Darrington Weaver in this case [R. pp. 25-26, 28-34] adds to the proof that deliberate misrepresentations were made for the purpose of perpetrating a fraud on the court. Dr. Weaver was convicted in 1941 and sentenced to Folsom Prison on fifteen counts of committing frauds on insurance companies in order to obtain money for himself and others through false and fraudulent injury claims. In each case he used a layman to make the claim, he instructed the layman in the manner of presenting the claim and he prepared and submitted to the insurance company the "medical report." (*People v. Weaver*, 56 Cal. App. 2d 732.)

Barrett saw Weaver on December 17, 1955 [R. p. 216]. In the spring of 1955, Barrett had been to several physicians in Chicago, but that was before he twitched or complained of twitching. The onset of the twitching was in June, 1955, *after* he had seen these physicians.

It was Dr. Weaver who referred Barrett to Morris Goren, the physician who testified during the trial [R. p. 88], and Dr. Goren said he first saw Barrett on December 27, 1955, ten days after Barrett's first visit to Weaver [R. p. 76]. Through Dr. Goren we have the

first medical testimony of the appellee's head jerks. Dr. Goren testified that when Barrett came to his office on December 27, 1955, he complained of twitching and tenderness of the head and neck [R. p. 76].

Whereas Dr. Weaver remained in the background and did not testify at the trial, he was present at the trial as a spectator and advisor, he ran errands for appellee after the trial, he inquired concerning the payment of the judgment, and he used his wife to notarize the satisfaction of judgment [R. pp. 28-34]. Dr. Weaver displayed an interest in the trial and the collection of the judgment different than that which one would expect from a doctor of medicine whose professional services had been engaged. His interest more than suggests that he has something substantial to gain as a result of the judgment. This, when considered along with the doctor's past record of perpetrating frauds on insurance companies, and the "coincidence" that appellee never complained of his torticollis to physicians between June, 1955 and December, 1955, before he saw Dr. Weaver, and appellee's rapid recovery after the trial (except when he is aware that he is being observed), establishes that the judgment was obtained by fraud, misrepresentation and other misconduct of the appellee. The remarks of Mr. Justice Story in *Wood v. United States*, 41 U. S. 342, 359-361, 10 L. Ed. 987, are apropos:

"* * * for fraud, being essentially a matter of motive and intention, is often deductible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy."

The case of *Chicago, Rock Island & Pacific Railway Co. v. Callicotte*, 267 Fed. 799 (C. C. A. 8, 1920), *Cert. den.* 255 U. S. 570, is particularly in point. In that case the plaintiff, an employee of the defendant railroad company, obtained a judgment in the state court for alleged paralysis of his lower limbs. Defendant moved the state court for a new trial, and an arrest of judgment. These motions were denied. Defendant then petitioned the court to review the matter under a writ of *coram nobis*. This was also denied. Its appeal to the State Supreme Court resulted in an affirmance of the judgment, and the railroad then brought this action in equity in the Federal Court for the purpose of enjoining the enforcement of the judgment on the grounds that it had been obtained by fraud and conspiracy, in that the plaintiff feigned his injury. The District Court denied relief, but the Court of Appeals reversed, and in so doing stated:

“We may even assume that he [plaintiff] had true paralysis on these several occasions [when examined by physicians] if possible, but the fact remains that in the intervals he had the use of his legs and had been seen and known to use them on many occasions. Yet this true history of the case was, by a conspiracy, concealed from the defendant; the false history of the case was given to the various doctors for the defendant, and even to one of the plaintiff’s doctors * * *. On this false and fraudulent foundation these medical experts rested their conclusion * * * the jury was deceived; the court was deceived * * * all by this conspiracy and fraud, a fraud consisting not merely in the testimony of plaintiff on the trial but also in this concocted plan outside of court, pursuant to which a false history of the case was made up and proclaimed.”

All of the remarks of the court in *Callicotte* are applicable to the case at bar. Even if we should assume that Barrett had a true torticollis on the several occasions he was examined by physicians, it remains a fact that in the intervals Barrett did not twitch or jerk his neck, but the true history of the case and the true condition of the appellee was by a conspiracy concealed from the appellant, the jury, and the court. Everyone was deceived by appellee's false testimony.

The California decisions are appropriate in considering a motion under Rule 60(b), since the rule was historically based upon Section 473 of the California Code of Civil Procedure.

See *Moore's Federal Practice*, Vol. 7, Sec. 60.10[1], [6] and [7], pp. 10-11, 16-21.

Particularly applicable to the facts presented herein is the case of *Rice v. Rice*, 93 Cal. App. 2d 646 (1949). There, the defendant husband in an action for divorce, had testified during the trial in a manner which *made it appear* that he had title to a certain piece of real property, the status of which (community or separate) was in issue. However, the husband had actually testified that the property was *not* in his name! The trial court had divided up the property on the assumption that the property was in the name of the husband, and the plaintiff brought a motion under Section 473 of the Code of Civil Procedure to set aside the judgment because in truth and in fact the husband had transferred the property to a third person before the trial. The motion was granted, and the District Court of Appeal affirmed, stating:

“Good faith on the part of the defendant required that he inform the court that he had conveyed the property to Davis. Under the circumstances here,

the conduct of defendant constituted a fraud upon the court. The court has inherent power to set aside a judgment obtained through fraud perpetrated upon it. * * * As above stated, the motion herein was made under the provisions of § 473 of the Code of Civil Procedure.”

In the case at bar, appellee not only testified that the twitching and jerking was present at all times; he not only gave such a history to his physician, upon which the medical opinion was predicated; but his actions throughout the trial, throughout the taking of his deposition and at other times when he was being observed made it appear beyond question that the twitching and jerking was present during all of his waking hours.

B. The Motive and Intent and the Complicity of Dr. Darrington Weaver.

Dr. Weaver's close relationship to this case and his past record of perpetrating frauds on insurance companies were properly before the District Court, and are relevant to the questions herein presented. Former fraudulent acts are evidence of lack of good faith, which is equivalent to an admission, and the recurrence of false claims of a similar sort tends to negative good faith in the present claim and thus show an intent to make a false claim.

Wigmore on Evidence (3rd Ed.), Vol. II, Sec. 340, p. 241.

This rule of evidence has been established by the United States Supreme Court. The earliest decision is that of *Wood v. United States*, 41 U. S. 342, 359-361, 10 L. Ed. 987.

See, also, *Butler v. Watkins*, 80 U. S. 456, 464, 20 L. Ed. 629, wherein the court stated:

“* * * Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit.”

The courts in the Ninth Circuit have applied this rule of evidence. In *Knudsen v. Domestic Utilities*, 264 Fed. 470, 474 (C. C. A. 9, 1920), this court stated:

“* * * in our opinion the court below was in error in excluding evidence proffered by the plaintiffs to show that the defendants had committed like frauds upon others. * * * In determining the existence of fraud, ‘great latitude is allowed in the introduction of evidence.’ * * *”

See, also:

Baldwin v. Warwick, 213 F. 2d 485, 486 (C. A. 9, 1954);

Jones v. United States, 162 Fed. 417, 427 (C. C. A. 9, 1908);

United States v. Lumantes, 139 Fed. Supp. 574 (N. D. Cal., 1955); and

Bowles v. Jung, 57 Fed. Supp. 701, 709 (S. D. Cal., 1944).

Professor Moore has put the matter this way:

“Suppose, however, that the fraud, misrepresentation or other misconduct is not that of the moving

party, but is that of a third person. If the wrong of the third person is fairly attributable, under general legal principles, to the party for whom judgment went, then the fraud, misrepresentation, or other misconduct is legally that of the prevailing party, and 60(b)(3) applies.”

Moore's Federal Practice, 60.24[5], p. 255, Vol. 7.

Dr. Weaver's past transgressions are fully set forth in the reported decision in *People v. Weaver*, 56 Cal. App. 2d 732. It will be observed that Dr. Weaver not only fabricated false claims (using a layman as the ostensible claimant), supported these claims with false medical reports and received the payments by the insurance companies, but he also testified in court concerning an alleged broken arm of one of the claimants and used an X-ray of the broken arm of another person, contending that it was an X-ray of the arm of his co-conspirator, the plaintiff in that case. This is the same Dr. Weaver who sent Porter Barrett to Dr. Morris Goren; the same Dr. Weaver who was present in court consulting with appellee's counsel during the trial of this action: who personally delivered to the office of appellant's counsel the Satisfaction of Judgment signed by the appellee and his counsel; who later telephoned counsel for appellant urging the latter to obtain the check from the Santa Fe as soon as possible. Barrett testified that Dr. Weaver did not treat him, he just "consulted" with him and referred him to Dr. Morris Goren. Yet Dr. Weaver remained actively interested in the case from a legal viewpoint, if not a medical one.

C. The Trial Court Applied Erroneous Standards of Judgment in Passing Upon Appellant's Motion.

The learned trial judge denied appellant's motion under Rule 60(b) because he was not satisfied that the jury would have returned a different verdict even had they heard the additional evidence presented by appellant [R. p. 180]. The judge remarked: "I will be candid to say that there are some strange things in it, the thing that caused you to become suspicious, the connection of Dr. Weaver, the mere fact that he is in the picture, that there is some suspicion * * *" [R. p. 178], but he considered that the motion should be denied because "if the jury were trying the case today and weighing the evidence and had everything presented to them that we have at this time, assuming that that were possible, I am not sure that they wouldn't come in with the same verdict that they came in with before." [R. p. 179.]

We respectfully submit that these remarks of the trial judge indicate that he failed to grasp the significance of this motion under Rule 60(b), and thus unintentionally abused his discretion in denying that motion. In support of this we call the court's attention to the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 246, 88 L. Ed. 1250, wherein the Supreme Court stated:

"Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."

The District Court, following the *Hazel-Atlas Glass* case, in *Jungersen v. Axcl Bros., Inc.*, 121 Fed. Supp. 712,

717 (D. C. N. Y.) *aff'd* 217 F. 2d 646, *cert. den.*, 349 U. S. 940, stated:

“Where perjurious testimony in furtherance of a premeditated plan or conspiracy has played some part in influencing the court to render a judgment which it would be unconscionable to enforce, the effect of such testimony will not be weighed in a suit in equity to set aside that judgment. *Hazel-Atlas*, *supra*. The testimony will be deemed material as a matter of law, since it was offered to defraud the court, and achieved that end.”

Thus we conclude that it was not pertinent for the trial judge to consider what effect appellee’s perjury might have had on the size of the judgment where, as here, “the very temple of justice has been defiled.”³ We contend that “* * * the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside.” (*Tozer v. Krause*, 189 F. 2d 242 (C. A. 3, 1951).)

See, also:

Bridoux v. Eastern Airlines, 214 F. 2d 207, 210 (C. A. D. C., 1954).

We submit that it is important for this court to articulate the standard by which the District judges must decide motions under Rule 60(b)(3), and we contend that such standard is not equivalent to the one used for passing upon a motion for new trial. The trial judge must use his discretion, but that discretion can only operate within a framework of fixed guideposts. Should the trial judge

³Mr. Justice Frankfurter in *Universal Oil Products v. Root*, 328 U. S. 575, 90 L. Ed. 1447.

in exercising his discretion fail to recognize the limitations of that discretion, his decision becomes arbitrary, irrespective of the fact that he has attempted to be fair to both parties. It is for the Appellate Court to direct the "approach".

In the world of the market place, where greed and ambition motivate the minds and actions of men, we tolerate much chicanery, viciousness and ruthlessness. In fact, in the popular mind, these qualities are sometimes encouraged, and one may be considered to be weak or stupid if he foregoes an immediate advantage in order to express honor or consideration. Yet, we train our youths in good sportsmanship because this always will be the basis of a good society.

In the courts we have reposed the duty of moral guardianship. Our courts have always recognized the frailties of mankind and the practical demands made upon businessmen in a competitive economy. In this field the courts have been loath to apply that concept of fair dealing which they apply in fields of trusts and other fiduciary relationships. Yet even in business, the legislature and the courts hold the public to a much higher duty of "fair dealing" than they did in other days. Examples are the demise of the doctrine of *caveat emptor*, the laws which forbid misleading advertising, and the laws pertaining to unfair competition. The tendency has been for the courts to demand a higher standard of conduct from people in their dealings *inter se*.

How much more important is it for these same courts to demand impeccable conduct in the use of their own processes? The desire for a final judgment—the termination of litigation—should not be so great that misleading statements and conduct of parties, made for the purpose of

gaining an unfair advantage by leaving the jury with a misapprehension of the facts should be tolerated by our Courts. In the words of Judge Clark, in *Publicker v. Shallcross*, 106 F. 2d 949, 952 (C. A. 3, 1939):

“We believe truth is more important that the trouble it takes to get it.”

Conclusion.

It is respectfully submitted that in the interests of justice, and in the interest of upholding the sanctity of the law and its “temples of justice”, the order denying appellant’s motion under Rule 60(b) should be reversed, and the trial judge should be instructed to vacate the judgment upon such terms as are just. (See *Fleming v. Mante*, 10 F. R. D. 391, 392.)

Respectfully submitted,

ROBERT W. WALKER,

LOUIS M. WELSH,

Attorneys for Appellant.

APPENDIX A.

Actions of Appellee.

| | |
|--|---|
| BEFORE AND DURING THE TRIAL, AND WHEN CONSCIOUS OF BEING OBSERVED. | AFTER TRIAL, AND WHILE NOT CONSCIOUS OF BEING OBSERVED. |
|--|---|

1. Mr. Barrett twitched every few seconds during the taking of his deposition [R. pp. 219-220], and he twitched continuously during the trial [R. pp. 102, 103, 114, 123, 125].

1. Under cover observation of appellee on May 26, 1956 discloses that he neither twitched nor contorted, and appeared completely normal [R. pp. 14-15].

Under cover observation on June 25, 1956 discloses that he neither twitched nor contorted, and appeared completely normal [R. pp. 20-21].

Under cover observation on June 26, 1956 discloses that he neither twitched nor contorted and appeared completely normal [R. pp. 22-24].

2. On May 28, 1956, after he learned that he was being observed [R. p. 33], appellee again started to twitch [R. pp. 18-19].

2. Under cover observation on May 28, 1956 discloses that he neither twitched nor contorted and appeared completely normal, until he became conscious of the fact that he was being observed [R. pp. 16-18, Exs. 1, 2 and 3].

BEFORE AND DURING THE TRIAL, AND WHEN CONSCIOUS OF BEING OBSERVED.

3. On June 20, 1956, while appellee was present at the office of counsel for appellant, he twitched and contorted his neck in the same manner as he had done during the taking of his deposition and at the trial [R. pp. 27, 31-32].

AFTER TRIAL, AND WHILE NOT CONSCIOUS OF BEING OBSERVED.

3. On June 20, 1956, after appellee had departed from the office of counsel for appellant and while he was not aware that he was being observed, he neither twitched nor contorted nor jerked his neck, and appeared to be perfectly normal in all respects [R. p. 32].*

*Although Mr. Barrett stated in his affidavit that he has reviewed appellant's affidavits [R. p. 48], he nowhere denied that he twitched his neck continuously while at counsel's office, but then "suddenly recovered" after he walked into the hallway, where he stood in a perfectly normal manner awaiting the elevator.

APPENDIX B.

Statements of Appellee.

TESTIMONY BEFORE AND DURING THE TRIAL:

1. During this deposition and since May of 1955 my head has been twitching almost continuously. It twitches all the time, I am very seldom without it [R. pp. 219-220]. I am unable to stop the twitching, I do not know if sometimes it is not as great as others because I do not have control of it. I don't know sometimes whether I am doing it or not doing it. I don't pay too much attention to it [R. p. 125].

2. I am never without it (the twitching) unless I am asleep and don't know about it [R. p. 50].

I do not know what would aggravate the twitching and I know nothing that diminishes the tendency to the twitching [R. pp. 50, 56].

TESTIMONY AFTER THE TRIAL:

1. During the trial I testified that I was seldom free from the twitching and by that I meant that at times varying from 1 to 4 hours I did not jerk [R. p. 49].

2. During times of stress such as the trial, taking of deposition, seeing doctors or lawyers, the jerking is worse [R. p. 49].

TESTIMONY BEFORE AND
DURING THE TRIAL:

3. I go to Dr. Darrington Weaver about three or four times a week. He never treated me for anything. He only talked to me. Well, you call this consultation, he sit and talked to me, it seemed to kind of relieve my thoughts and head and mind [R. p. 218]. Dr. Weaver did not treat me. He recommended that I go to see Dr. Morris Goren [R. p. 103].

TESTIMONY AFTER THE
TRIAL:

3. At no time has Dr. Weaver advised me what to do. At no time have I conspired with Dr. Weaver to exaggerate my injuries [R. p. 49].

No. 15348

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a corporation,

Appellant,

vs.

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Appellee.

Appellee's Reply Brief

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PORTER BARRETT,

Appellee.

Appellee's Reply Brief

STATEMENT OF CASE

Appellee, Porter Barrett, filed this action by reason of injuries received March 11, 1955, while working as a dining car waiter, on a train owned and operated by the appellant, and while both were engaged in the furtherance of interstate commerce. As to liability of appellant, counsel for defendant in the court below stated:

“In trying to view this case not as an advocate, but in making an attempt to see it objectively, I can see that there would be sufficient basis for the jury to have found the railroad company negligent in this case.” (R. p. 160)

Appellee testified that his injuries were sustained by reason of a chill box door being slammed against his head, by a fellow employee. That he found himself dazed sitting in the middle of the floor. His head was bleeding and his head and neck were hurting him. (R. p. 92) That during the month of April he saw his own physician, Dr. Jacobs, who advised him to see his company doctor. (R. p. 93) Appellee called on Dr. Mathews, defendant physician, at Los Angeles, who advised taking x-rays in Chicago. An order was issued 4/22/55. (R. p. 98) Mr. Ford a supervisor advised appellee not to go to the hospital in Topeka. (R. p. 98) Barrett then saw Dr. Buttice, a company doctor, the latter part of April 1955, who took x-rays. He complained to Dr. Buttice of terrific headaches, and that his neck was very stiff. (R. p. 99) He did not treat him. (R. p. 100) He then saw another company doctor at 105 South La Salle. He complained to him about his head and neck but the doctor only cleaned out his ears. (R. p. 100) The appellee then saw another company doctor at 104 South Michigan Avenue and complained about terrific headaches and stiff neck. He first noticed the jerking of the neck about the last of May or the first of June, (R. p. 102) and it has continued since that time. In December he again went to see Dr. Jacobs, who again advised that he see his company doctor, but instead he saw Dr. Darrington Weaver who referred him to Dr. Morris Goren. (R. p. 103) Dr. Goren diagnosed the case as spasmodic torticollis, due to a blow on the head he received March 11, 1955 (R. p. 78) and that it may last the rest of his

life. On cross-examination it was revealed that Dr. Heifitz told Dr. Goren that plaintiff had a fairly severe cerebral concussion, with a functional overlay, with a functional condition of spasmodic torticollis, based upon a marked emotional reaction. Dr. Goren also testified that, actually we do know that this man did sustain a head injury and that following that head injury certain pressures developed, including this spasmodic torticollis. (R. p. 82) He had tenderness over the right sterno mastoid incision. By palpitation over that region of the mastoid incision he had tenderness in that region, and there was intermittant spasm, in other words, that muscle goes into spasmodic state and throws his head in peculiar positions, the jerking of the head and neck. (R. p. 84) Appellant's doctor, John B. Doyle, examined Barrett April 10, 1956, but the defendant failed to put him on the stand in the trial below. On motion to set aside the judgment on the ground that it was obtained by fraud of plaintiff and Dr. Darrington Weaver, the defendant filed in support thereof, a letter by their examining physician, who stated as follows:

“From these data it would appear that as a result of the accident of February 11, 1955, the patient received a contusion of the scalp without losing consciousness. The evolution of his symptoms was gradual and unquestionably was aggravated by resentment toward an official of the commissary department of the Railway at Chicago. The clinical picture is not that of spasmodic torticollis but rather of habit spasms. In my opinion Mr. Bar-

rett's symptoms are due entirely to mental causes. In this case settlement of the litigation may be expected to be followed by his prompt recovery."

The defendant and appellant agreed to settle the case and a satisfaction of judgment was signed by plaintiff's attorney. Exhibit A (R. p. 34) Dr. Weaver delivered this satisfaction to the office of Lewis Welsh, on the 6th day of June, 1956. On the 20th of June Barrett delivered the final papers to Mr. Welsh's office. It was on this day that Mr. Welsh observed the plaintiff jerking his neck while in his office and then observed him for a few moments at the elevator, apparently without jerking his head or neck. As far as Barrett was concerned from this moment on his case was settled, just awaiting the check which had been promised by the defendant. From this moment on according to the affidavit of appellant's doctor, Barrett could expect to have immediate relief from the affliction of his neck and head which Dr. Doyle attributed to mental causes and would be relieved by an end of litigation. Mr. Welsh was upset because of a call which he claims he received from Dr. Weaver because Dr. Weaver wanted to know how soon the defendant would deliver Mr. Barrett's draft to him. Dr. Weaver denies this call in his affidavit. The defendant says this evidence together with the interest displayed by Dr. Weaver attending the trial and his conviction for fraud supports their claim that Barrett and Dr. Weaver conspired to defraud the Santa Fe Railway. Although the defendants do not say so, they imply by argument only,

that Dr. Weaver conceived the idea that plaintiff should feign that he had what Dr. Goren calls spasmodic torticollis. The plaintiff in opposition to defendant's motion filed affidavits by fellow employees, to the effect that they observed plaintiff jerking his head for about six months prior to the time that Dr. Weaver first met and treated the plaintiff. Arnold Roberts (R. p. 36), Leonard Nash (R. p. 37), Rhodes Robinson (R. p. 39), Walter Bogeman (R. p. 40), Jessie Mitchell (R. p. 41), Richard Goldsmith (R. p. 42), Calvin Davis (R. p. 44).

Several of these employees were subpoenaed by plaintiff but the company advised them not to attend, that they were not legally served with process. Jessie Mitchell (R. pp. 41, 42), Calvin Davis (R. pp. 43, 44).

In the court below Mr. Welsh stated that his motion was based primarily on what the court was able to observe and the pictures of the undercover men. (R. p. 128) The pictures cover a period of less than fourteen minutes that Barrett was under observation by the undercover men.

After observing the pictures and listening to argument the court observed as follows: (1) He was not certain after considering the evidence (pictures and affidavits) that the jury would have come to a different conclusion. (2) There was no evidence of fraud or misrepresentation. (3) After reading Dr. Doyle's affidavit that the defendant could have expected what was revealed by the pictures and affidavits. The de-

defendant places great stress on the fact that the plaintiff testified that he twitched all the time and that he was "seldom without it". There was no cross-examination as to what the plaintiff meant by "seldom without it". It may have been one, two, or six hours. Webster's new dictionary defines seldom as, rarely, infrequently. Without further explanation it could have meant anything.

At the hearing on the motion plaintiff filed an affidavit by Dr. Weaver disclosing that he was licensed to practice his profession in the State of California and that he was on December 23, 1953, granted a full and unconditional pardon for the offenses referred to in defendant's affidavit. (R. pp. 47, 48). A photostat of the pardon was introduced in evidence but has failed to find its way to this court.

Dr. Weaver's actions in this matter were always open and above board. Immediately upon receiving Barrett as a patient he wrote a letter to the commissary department so advising them. The railroad acknowledged Dr. Weaver's letter and asked for amplification and on January 30, 1956, Dr. Weaver wrote the defendant stating that Barrett was suffering from, (1) Traumatic torticollis, (2) General neurosis and psychosis, due to trauma, (3) General Debility. (R. pp. 43, 44) The plaintiff's deposition was taken on March 7, 1956, where his jerking of the neck was observed by attorney for defendant, and plaintiff stated that he went to see Dr. Weaver on the 17th day of December, 1955. Dr. Weaver's conviction was not only

a matter of record in Los Angeles County, it was recorded in the decision of the District Court of Appeals, cited by the appellant. In the court below Mr. Welsh stated: (R. p. 155)

“We also point out in our memorandum of points and authorities and our affidavits disclose the income interest of Dr. Darrington Weaver. Now, that is background. That in *itself spells nothing*, but coupled with the other factors we believe have been admitted by plaintiff’s own affidavits, *it at least indicates a gross exaggeration.*”

Here we have plaintiff’s own counsel admitting that at the most he has shown an exaggeration, which we also deny and contend the affidavits merely show a difference of opinion between doctors as to the duration of the injury, and the character of the injury. But at the trial the defendant thought his cause would be better served by not challenging the testimony of the plaintiff’s medical testimony. Let us examine the other factors the defendant claims supports his suggestion of exaggeration. The testimony of undercover men and their pictures which disclose a period of observation of 14 minutes and in one of these pictures they admit the plaintiff was twitching. In respect to Dr. Weaver, the facts in addition to his conviction is the fact (1) That as a licensed practicing physician he served Barrett in his capacity as a physician beginning December 17, 1955. (2) That he recommended Dr. Goren to the plaintiff. (3) That Dr. Weaver attended portions of the trial and was seen talking to counsel for plaintiff.

(4) After the trial he delivered a paper to Mr. Welsh's office. (5) That Dr. Weaver phoned Mr. Welsh's office and inquired when the draft would be ready for delivery. (Dr. Weaver denies this.) From these facts the defendant must contend, that as a matter of law, fraud has been established.

ARGUMENT

FRAUD IS ODIUS AND NEVER PRESUMED

The decisions are uniform in holding that fraud is never presumed and must be established by proof.

“Fraud is odious and is never presumed; it must be established by proof. The presumption is always in favor of fair dealing, except perhaps where confidential relations are involved. This presumption is said to approximate in strength that of innocence of crime. The burden of proving fraud, is therefore on the person asserting it.”

12 Cal. Jur. pg. 816;

Truett v. Onderdonk, 120 Cal. 581;

Luckenbach Estate, 205 Cal. 292.

In *Assman v. Fleming*, 159 Fed. 2d 332, at 336, it was held, at page 336:

“The burden of proving such fraud and misrepresentation is of course, upon the applicant and fraud is not to be presumed and must ordinarily be proved by clear and convincing evidence. It must also be made to appear, where application is

made by defendant that he has a meritorious defense to the action.”

It is obvious that the defendant and appellant has failed to show that he has a meritorious defense to this action, all issues of fact raised by his affidavits have been resolved against him by the court decision below. The court below found that,

“but there isn’t any fraud or misrepresentation.”
(R. p. 180)

NO INFERENCE OF WRONGDOING CAN BE DRAWN FROM DR. WEAVER’S CONVICTION

“It has been held that a pardon ‘releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.’ ” *Matter of Emmons*, 29 Cal. App. 123; Section 4853, Penal Code (effect of pardon).

THERE IS NO EVIDENCE OF CONSPIRACY

The gist of the crime of conspiracy is the agreement to commit an offense and an overt act in the furtherance of the agreement.

People v. Black, 45 C.A. 2d 87;

People v. Gordon, 71 C.A. 2d 606.

We again quote from the argument of counsel in the court below :

“And we don’t contend that Weaver’s situation is and of itself determinative of anything.”

Arguing below the defendant only claimed Dr. Weaver’s connection with the case, was “cause for grave suspicion.” (R. p. 177) Yet the defendant would have this court magnify what counsel calls suspicious circumstances into facts which amount to fraud as a matter of law. The appellant therefore fails to meet his burden of establishing fraud by clear and convincing evidence.

**THE FRAUD MUST BE SUCH AS PREVENTED
THE DEFENDANT FROM MAKING A FULL
AND FAIR DEFENSE.**

It is clear that under this rule defendant was advised fully of Dr. Weaver's connection with the case at all times, and should have attempted to call the attention of the jury to any fact which they deemed of a suspicious nature. But in that Dr. Weaver was never a witness in the case, unless they could have established a conspiracy in the case, any action he might have had in other cases becomes immaterial. The cases appellant cites in respect to error in rejecting proffered evidence of like frauds has no application in this case. Referring to *Knudsen v. Domestic Utilities*, 264 Fed. 470, and other cases.

In *Town of Boynton v. White Construction Company*, 64 Fed. 2d 193, the court held as follows:

“The most that can be said of plaintiff's case is that there is some evidence that the judgment was obtained on an altered contract, and that the amount recovered was through the fraud and collusion of the City Council and the Engineer in allowing the final estimate for more than it ought to have been. There is neither claim nor proof that ‘the fraud charged really prevented the party complaining from making a full and fair defense.’ There is neither claim nor proof that anything was done by the contractor to prevent the city from making its defense” . . . “The most that can be said of plaintiff's evidence is that if it had been

offered in the original suit, it would have presented an issue for decision; offered as it was in this suit to set aside the judgment, it falls far below the measure of proof required.”

It was held in *Toledo Co. v. Computing Company*, 261 U.S. 421:

“We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinction made between intrinsic and extrinsic frauds in the application of the rule, because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud fails.”

Also see:

Harrison v. Triplex Mines, 33 Fed. 2d 671;
Wheiles v. Aetna Life Ins., 68 Fed. 2d 99;
Miller Rubber Company v. Massey, 36 Fed. 2d 466;
Simonds v. Norwich Union, 73 Fed. 2d 415;
Fiske et al. v. Fuller, 125 Fed. 2d 849;
Hadden v. Ramsey Products, Inc., 196 Fed. 2d 92;
U. S. v. Throcmorton, 98 U.S. 93.

The appellant seems to place great reliance on the case of *Chicago, Rock Island & Pacific Railway Co. v. Calicotte*, 267 Fed. 799. The difference in the factual

situations is apparent from a reading of the case. In the *Calicotte* case fraud was proved clearly and convincingly. It was proved beyond a reasonable doubt that in fact Calicotte was never paralyzed. That in conspiracy with others he prevented this from becoming known until there was a falling out of the conspirators. That temporary paralysis can be brought about by artificial means. Calicotte was seen in woman's clothing, for the purpose of disguise, and on being discovered stated "the jig is up". That he threatened to kill a member of his wife's family if they disclosed his hoax. That his own doctor testified against him on the motion to the effect that if he had ever walked prior to his examination that the feigned condition was brought about by artificial means.

The actions and statements set up by the defendant in appendix A and B disclose factual matters that were resolved against the appellant by the action of the jury and the court below in deciding the motion against the appellant.

It thus becomes apparent that the appellant has failed to establish that the judgment was procured by fraud of appellee or by reason of a conspiracy with Dr. Weaver, because:

- (1) The use of the word "seldom" without further elaboration could have meant most any time—one hour, two hours, six hours or more.
- (2) This court will not weigh the effect of such testimony, which has been passed upon, by the jury and court.

- (3) The attempted impeachment of Dr. Weaver cannot be considered as evidence of a conspiracy.
- (4) Dr. Weaver is licensed to practice his profession in the State of California, and he has received a full and unconditional pardon for the offenses in question.
- (5) No culpable act can be inferred from the plaintiff going to Dr. Weaver for treatment, nor from the errands Dr. Weaver did for plaintiff, nor from his presence in court.
- (6) The issue of fraud comes too late because it is based on evidence which has been considered by the jury and the court, with the exception of the pictures taken by the undercover men, which merely confirms what the defendant might expect from the testimony of their own doctor.
- (7) The plaintiff did nothing to mislead defendant or prevent him from making his defense.

We respectfully submit that the appellant has failed to meet his burden of establishing fraud by clear and convincing evidence, and ask that the order of the court denying appellant's motion to set aside the judgment be affirmed.

Respectfully submitted,
ERWIN P. WERNER,
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Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Some Observations on Appellee's Brief.

On page 4 of his brief, counsel for Mr. Barrett states that it is only natural that Mr. Barrett should have immediate relief from his affliction, since his case had been settled and he was merely awaiting the check which had been promised by the defendant. This is an interesting observation, since it assumes that an injured person who magnifies his disability through the commencement of legal proceedings is entitled to collect a judgment based upon the magnified symptomology, even though it is expected to disappear at the conclusion of the litigation.

On page 7 of his brief, counsel quotes from the record wherein appellant's counsel stated that Dr. Weaver's complicity "* * * at least indicates a gross exaggeration."

Then in the next sentence Mr. Barrett's counsel states that the Railway Company's counsel admitted that "* * * at the most he [Barrett] has shown an exaggeration * * *"

Counsel has argued at great length the question of fraud, and that it is never presumed. This is true. The rule, however, provides that judgments may be set aside for fraud, misrepresentation, or other misconduct.

II.

The Effect of Appellee's Counter-Affidavits.

The nine affidavits filed by appellee in opposition to our motion do not contradict one fact contained in the affidavits filed by appellant in support of the motion, except that Dr. Weaver denied that he had ever talked with counsel for appellant.

Appellee did not deny that his activities were normal in all respects while he was under the surveillance of Messrs. Perry and Wilson. He did not deny that he came to the office of counsel for appellant on June 20, 1956, twitching his neck; that while he talked with counsel he jerked his neck in the same manner as he did at the trial; nor does appellee deny that after he left the office of appellant's counsel and stood in the corridor waiting for the elevator he ceased his twitching and remained in a normal, relaxed posture.

Appellee's position appears to be that he merely *exaggerated* his complaints. If we assume, *arguendo*, that appellee did no more than grossly exaggerate his complaints, he is still guilty of misrepresentation and other misconduct. In his own affidavit, appellee states that the jerking is worse under times of stress such as when he sees lawyers. Apparently the effect of seeing a lawyer is

quite dynamic, but fortunately for Mr. Barrett, all of the stress and strain disappears as soon as he gets out of the lawyer's sight.

The affidavits filed by appellee's co-workers are of no probative value, because they lack the essential information needed to determine whether or not appellee jerked his head before he went to see Dr. Darrington Weaver, and to what extent he jerked his head. Roberts, Nash and Bozeman state in their affidavits that "Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals during our conversations." The witnesses do not state whether these conversations were on or off the job, that is, before or after December, 1955. Nor do the affidavits give any clue to what the witnesses mean by "several months." Even if the witnesses could not remember the exact date, they could have remembered whether they noticed the twitching before or after Barrett laid off work.

Affiant Robinson stated that he has known Barrett for ten years, that he lives in the same neighborhood with Barrett and sees him fifteen days each month; yet he can say no more than that "during the past 'several months' I have observed him intermittently jerking his head."

Affiants Mitchell, Goldsmith and Davis say that they first noticed the jerking "about a year ago." Is eight months "about a year ago?" If so, then they have added nothing to the other affidavits. Again, there is no attempt to show that the twitching was observed before appellee quit working in December, 1955.

Moreover, neither appellee's wife nor his closest friend, David Holmes, filed affidavits in this case. The motion

pictures reveal that Holmes and appellee's wife are appellee's constant companions. One would expect their memories on this subject to be more precise.

We contend that appellee's affidavits in opposition to appellant's motion make it abundantly clear that he misrepresented the facts, and was guilty of misconduct during the trial of this case. If appellee elects to more precisely define the frequency with which he suffers from the affliction, *after the verdict has been rendered*, then is it not proper for the Court to more precisely determine the damages, if any, to which he is entitled under this new testimony? Should the appellant be required to pay, under order of Court, on the basis of testimony which now has been repudiated, or "more clearly expressed", so as to give an impression totally different from that given at the time of trial? We think not.

Respectfully submitted,

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No. 15348

IN THE

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No. 15348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

PETITION FOR REHEARING.

To the Honorable the Chief Judge and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, The Atchison, Topeka and Santa Fe Railway Company, hereby petitions for a rehearing *en banc* in the above-entitled matter, upon the following grounds:

- (1) The Opinion and Decision of this Honorable Court neither discusses nor considers certain evidence in the record which establishes beyond question, and with clear and convincing force, that appellee misrepresented his physical condition during the trial.
- (2) The Opinion and Decision of this Honorable Court fails to discuss the scope of the discretion of a trial judge when passing upon a motion under Rule 60, Federal Rules of Civil Procedure.

In compliance with Rule 23 of this Honorable Court, counsel for appellant, Louis M. Welsh, Esq., hereby certifies that in his judgment this petition is well founded, and it is not interposed for delay.

I.

**Evidence Which Establishes the Misrepresentation
Not Considered in the Court's Opinion.**

From the Court's candid statement that it would not have reversed the granting of our motion, we conclude that this Court agrees that there is ample evidence in the record to *justify* a vacation of the judgment under Rule 60(b). The Court concluded, however, that the trial judge did not so egregiously err that an appellate court should find that he *abused* his discretion. Further, this Court holds that appellant has the burden of proving by "clear and convincing evidence" that appellee was guilty of misrepresentation. It is respectfully submitted herein that a portion of the record not discussed in the Court's opinion establishes by *clear and convincing evidence* that appellee misrepresented a material fact.

It is true, as the Court states, that "the pictures raise grave suspicion * * * but they are far from conclusive." It is also true that although Dr. Darrington Weaver's participation is "another unusual factor in the case * * *," it does not necessarily establish misrepresentation by clear and convincing evidence. The fact that Mr. Barrett was able to immediately cease his twitching after leaving counsel's office would make sanguine men more than suspicious of the validity of his claim, but it would not necessarily require the reversal of the judgment of the trial judge, who had "felt the 'climate' of the trial."

But can we escape from the conclusion that Mr. Barrett misrepresented his physical condition at the trial when his testimony therein is compared with his sworn affidavit? At the trial, Mr. Barrett testified as follows:

“Q. *Sometimes it is not as great as others, is that right?* A. *I don't know, sir, because I don't have no control of it; I don't know sometimes whether I am doing it or not doing it, I don't know.*

Q. Don't you know when you are doing it and when you are not doing it? A. *I don't pay too much attention to it; no.*” [Tr. p. 125.]

In his affidavit, Mr. Barrett stated:

“* * * that during the trial he [affiant] testified that he was seldom free from it; *that by this, he meant that at times* varying from one to four hours, *he did not jerk; that during times of stress, such as the trial, taking of deposition, seeing doctors or lawyers the jerking is worse;*” [Tr. p. 49. Emphasis supplied.]

From his own sworn testimony it appears, clearly and convincingly, that Mr. Barrett represented at the trial that he *did not know* if his twitching was greater at some times than at other times, while in truth and in fact, as he stated in his affidavit, he *then knew* that the twitching was worse when he was under the stress of seeing doctors or lawyers. From his own sworn testimony it appears, clearly and convincingly, that Barrett represented during the trial that he *did not know* if the twitching continued at all times without interruption, because he didn't pay much attention to it, while in truth and in fact, as he stated in his affidavit, he *then knew* that he was sometimes free of the affliction from one to four hours. The Court did not refer to this evidence.

We submit that a trial judge may, within his discretion, determine if a shade of grey shall be classified as white or black, and in the absence of abuse thereof, his discretion should not be set aside by the Court of Appeals. To continue with the simile, the judge's discretion should be final *unless* he determines that "Oxford gray" is white, or "seagull gray" is black.

The effect of the motion pictures, the undercover investigation, and the complicity of Dr. Darrington Weaver fall into this "gray" area. But not so with the statements which come from the mouth of appellee. His sworn testimony and his sworn affidavit establish without question that he did not tell "the truth, the whole truth, and nothing but the truth" during the trial of this case. He misrepresented the nature and extent of his disability. This was one of the two issues contested in the litigation. The misrepresentation has been shown as a palpable fact by clear and convincing evidence out of the mouth of him who is accused of misrepresenting.

II.

The Area in Which Discretion May Operate.

This Court cites *Assman v. Fleming*, 159 F. 2d 332, 336 (C. A. 8, 1947), wherein it is stated that

"the discretion is * * * a sound legal discretion guided by accepted legal principles * * *."

What are those principles? We have found no case which specifically articulates the criteria to be applied in passing upon motions under Rule 60. If these matters are to be reposed in the sound discretion of the trial judges, then we respectfully submit that it is the duty of the courts of appeal to articulate those "accepted legal principles" which should guide this sound discretion. We con-

tend that the discretion should operate only where the evidence concerning misrepresentation is in conflict. Where there is no conflict, as here, the decision of the trial judge should not be “canonized” under the discretion rule. The trial judge went beyond the area in which his discretion is allowed. We submit that he did so, not from malice or prejudice, but because he followed the criteria established for passing upon motions for new trial. He measured the *effect* of the misrepresentation on the verdict.

III.

Authorities Cited, but Not Applicable.

The case of *Independent Lead Mines v. Kingsbury*, 175 F. 2d 983 (C. A. 9), is not appropriate to a consideration of this case. The *Independent Lead Mines* case was an action in equity, not a motion under Rule 60. The Court there held that the fraud must be extrinsic to justify relief, whereas Rule 60 specifically provides that fraud, whether intrinsic or extrinsic, is ground for relief from a judgment. Moreover, the statement in *Toledo Scales Co. v. Computing Scales Co.*, 261 U. S. 399, 421, that the fraud charged must prevent the party complaining from making a full and fair defense, is not appropriate under Rule 60. That case was decided in 1922, long before the Federal Rules of Civil Procedure, and the case concerned fraud, not misrepresentation or other misconduct.

IV.

Conclusion.

The Federal Rules of Civil Procedure have been considered to be effective tools for the “search for truth” as opposed to a game of skill. To accomplish this noble purpose, the rules permit exhaustive pre-trial discovery. The same laudable motive to get the truth resulted in Rule 60,

which requires the strictest honesty and candor on the part of those who would use (not abuse) the Court's processes.

"Negligence" under the Federal Employers Liability Act means something different than "negligence" in an automobile accident case. But we do not have different standards of honesty for different kinds of "negligence" cases. If anything, it is more important, not less important, to demand a strict accounting of the truth from those who receive a bounty to which strict and traditional legal concepts would not entitle them. By this we mean that if railroad workers, as well as seamen, are to be "wards of the Court," then the guardian—like the parent—has some responsibility to see that the ward does not impose by dishonesty or misrepresentation. Especially is this so where the guardian is not the one who gives the bounty from his own resources.

We respectfully, we earnestly and whole-heartedly contend that Mr. Porter Barrett has himself given clear and convincing, nay, unequivocal, evidence of the fact that he did not tell the truth at the trial of this case.

Respectfully submitted,

ROBERT W. WALKER,

LOUIS M. WELSH,

Attorneys for Appellant.

Certificate of Counsel.

I, LOUIS M. WELSH, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

LOUIS M. WELSH,

Attorney for Petitioner.

No. 15348

In the
United States Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

Answer to Petition for Rehearing

ERWIN P. WERNER,
215 West 7th Street,
Los Angeles 14, California,
Attorney for Appellee.

FILED

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In the
United States Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
a corporation,

Appellant,

No. 15348

vs.

PORTER BARRETT,

Appellee.

Answer to Petition for Rehearing

*To the Honorable Chief Judge and the Associate
Judges of the United States Court of Appeals
for the Ninth Circuit:*

The petitioner bases his claim to a rehearing on two grounds, one of which is the following:

(1) They state: The opinion and decision neither discusses nor considers certain evidence in the record, which "establishes beyond a question, and with clear and convincing force appellee misrepresented his condition during the trial." This statement is without foundation in fact or truth. The evidence to which

they refer is found on page 3 of the petition for a rehearing and which is as follows:

“Q. Sometimes it is not as great as others, is that right?

A. I don't know, sir, because I don't have no control of it; I don't know sometimes whether I am doing it, I don't know.

Q. Don't you know when you are doing it and when you are not doing it?

A. I don't pay too much attention to it; no.”

The petitioner to give force to his claim that the above statement is false underscores a portion of it. It is significant, however, that he fails to underscore the use of the word “sometimes”, used as follows:

“I don't know sometimes whether I am doing it . . . ”

Webster's new unabridged dictionary, second edition, defines sometimes as follows:

Sometimes, at times; not always; now and then; occasionally.

This fits in exactly with Barrett's affidavit where he explains the use of the word “seldom”, and which is quoted by petitioner in an attempt to show a false statement. To say that the court did not consider this evidence is a false statement. The court in its written opinion on page 2 states:

“By deposition taken before trial, plaintiff testified he had no control over the twitching, that he

was seldom without it, though unaware whether or not he was twitching.”

However, we must observe that the court failed to quote the use of the word sometimes. Of course the court cannot be expected to set forth all of the testimony, but only a summary of that portion deemed pertinent.

At most the petitioner has shown uncertainties, inconsistencies, or conflicts, all of which have been resolved against the petitioner by the jury and the court below.

Under point two the petitioner asks the court to water down the well-established rules for establishing fraud and misrepresentation. In its decision the court states:

“and this circuit has found no difficulty setting up the rules, denominating them well understood.”

The court in its opinion has given consideration to all of the points again raised by the petitioner.

“Where a citation was mainly relied on at the oral argument and appeared prominently in the brief, rehearing should not be applied for on the ground that the court inadvertently overlooked the citation, but it should be assumed that the court had given the point due consideration. *F. Rosenstern & Co. v. U. S.*, 171 Fed. 71.”

We feel the court has given due consideration to a renewal of the points made in the petition for rehearing.

Respectfully submitted,

ERWIN P. WERNER

Attorney for Appellee

No. 15349

United States
Court of Appeals
for the Ninth Circuit

JEFFERSON STANDARD LIFE INSURANCE
COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, H. L.
BYRAM, County Tax Collector of Los Angeles
County, and GEORGE T. GOGGIN, Trustee
of Stockholders Publishing Company, Inc., a
Corporation, Bankrupt,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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PAUL P. O'BRIEN, C

No. 15349

United States
Court of Appeals
for the Ninth Circuit

JEFFERSON STANDARD LIFE INSURANCE
COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, H. L.
BYRAM, County Tax Collector of Los Angeles
County, and GEORGE T. GOGGIN, Trustee
of Stockholders Publishing Company, Inc., a
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Transcript of Record

Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 17, California.

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111 West Seventh Street,
Los Angeles 14, California.

For Appellee, United States of America:

CHARLES K. RICE,
Assistant U. S. Attorney General;
LEE A. JACKSON,
Attorney, Department of Justice,
Washington 25, D. C.;
LAUGHLIN E. WATERS,
United States Attorney;
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,
808 Federal Building,
Los Angeles 12, California.

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy No. 64381-WB

In the Matter of:

STOCKHOLDERS PUBLISHING COMPANY,
INC.,

Bankrupt.

ORDER AUTHORIZING TRUSTEE TO SELL
REAL AND PERSONAL PROPERTY
FREE AND CLEAR OF LIENS

The verified petition of George T. Goggin, Trustee in Bankruptcy herein, for an Order of this Court authorizing said Trustee to sell the real and personal property of the bankrupt estate free and clear of liens, having come on for hearing before this Court on the 14th day of April, 1955, at the hour of 10:00 o'clock a.m., the Trustee being present by his associate, A. J. Bumb, and being represented by his counsel, Robert H. Shutan, and Craig, Weller & Laugharn, by Robert H. Shutan; respondent Jefferson Standard Life Insurance Company being represented by its counsel, Meserve, Mumper & Hughes, by Leo E. Anderson; the Director of Internal Revenue of the United States of America, being represented by his counsel, Eugene Harpole, Esq.; counsel for the Trustee advising the Court that he had a written communication from Stanley K. Brown of the firm of Brown, Hamill & Hunt,

Attorneys at Law of Pasadena, California, that said firm represented respondent, John W. Lytle Corporation, which communication stated that said respondent did not wish to contest the petition of the Trustee; [2*] and counsel for the Trustee advising the Court that he had received on April 13, 1955, a telephone communication from Andrew Porter of the office of the Los Angeles County Counsel, representing respondent, H. L. Byram, County Tax Collector, and that said respondent through his counsel stated that he had no objection to this Court making its Order authorizing the Trustee to sell the real and personal property of this bankrupt estate free and clear of the liens as prayed in said petition; and after hearing statements from all counsel present, now upon said petition of the Trustee, statements of counsel of the proceedings herein, and good cause appearing therefor, it is hereby

Ordered as follows:

1. That George T. Goggin, the Trustee herein, be and he hereby is authorized to sell free and clear of the trust deed, chattel mortgage, liens and encumbrances described in the Trustee's petition, the real and personal property of this bankrupt estate described in said petition, and

2. That the liens of the trust deed, chattel mortgage and other liens and encumbrances described in said petition be transferred to the pro-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ceeds of the sale of said real and personal property covered by said liens, and, subject to the conditions set forth in the following paragraph, said proceeds of sale being subject to the payment of costs to this estate of the preservation of said assets, the actual and direct costs and expenses of the sale of said assets, including, but not necessarily limited to, appraisers' fees, costs of notices, advertising expense, commissions, if any; auctioneers' fees and charges, if any, and also subject to what this Court shall determine to be the beneficial costs of administration; and

3. That the authorization granted herein to sell free and clear of liens is subject to the stipulation hereby imposed by this Court that no proposed sale of such real and personal [3] property of this estate by the Trustee will be confirmed by this Court unless the proceeds therefrom are at least equal in amount to the sum of the balance owing to Jefferson Standard Life Insurance Company upon the obligation owing to it, secured by said deed of trust and chattel mortgage and the amounts owing upon the liens on said property in favor of H. L. Byram, County Tax Collector, this provision being a measure of amount only and not in any way a ruling or determination as to the respective or relative rights of or among the various lienholders of this estate; this Order being without prejudice to any further proceedings, if any, in connection with a determination of the relative priorities of the various lien claimants.

Dated: April 27, 1955.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Approved as to form pursuant to Rule 7a.

HAROLD W. KENNEDY,
County Council;

By /s/ ANDREW O. PORTER,
Attorneys for H. L. Byram,
County Tax Collector.

MESERVE, MUMPER &
HUGHES,

By
Attorneys for Jefferson Standard Life Insurance
Company.

EUGENE HARPOLE,
Civil Advisory Counsel,

By /s/ EUGENE HARPOLE,
Attorney for Director of
Internal Revenue.

/s/ BRUCE I. HOCHMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed April 27, 1955, Referee. [4]

[Title of District Court and Cause.]

PETITION AND NOTICE THEREON

To the Honorable David B. Head, Referee in Bankruptcy:

The verified Petition of George T. Goggin respectfully alleges:

I.

That he is the duly elected, qualified and acting Trustee in the above-entitled bankruptcy proceedings.

II.

That heretofore and on April 27, 1955, the Referee made an Order authorizing the Trustee to sell the real and personal property assets of this bankrupt estate free and clear of liens. Thereafter and on April 29, 1955, an Order was made confirming the sale thereof to Samuel C. Rudolph, Trustee, for the amount of \$382,500. The sale's escrow has been opened at the Title Trust & Insurance Company and the trustee is proceeding to close the same and to conclude the sale.

III.

Your trustee alleges it is necessary there be a determination herein of the nature, extent, amount, validity, priority and right to participation in the said sale's proceeds [5] of the following liens upon the said assets so sold, to wit:

1. County of Los Angeles and/or H. L. Byram, County Tax Collector thereof, general and special county and city taxes for fiscal year 1954-55;

2. United States of America and/or Director of Internal Revenue, lien for \$235,566.10 with interest and penalties, assessment No. 19661, filed in the office of Collector of Internal Revenue, 6th District of California, on March 14, 1952, and notice of lien filed December 20, 1954, as No. 160559 in the office of the County Recorder of Los Angeles County;

3. Mortgage or Deed of Trust upon real property and chattel mortgage upon personal property, executed by bankrupt on December 1, 1945, recorded on same date to secure an original indebtedness of \$1,000,000, payable to Jefferson Standard Life Insurance Company;

4. Mechanic lien claim by John W. Lytle Corporation, an action filed to foreclose the same on March 23, 1955.

IV.

Your trustee requests a determination be had with respect to the legal rights upon behalf of the said lien claimants or any of them to receive payment of interest after December 31, 1954, the date of the filing of the within bankruptcy proceeding. Your trustee alleges it is also necessary a determination and allocation of the sale's proceeds of \$382,500 be had as to the portion attributable to the real property and as to the portion attributable to the personal property and in connection therewith your trustee requests that [6] the determination and allocation thereof be \$206,664.25 to real property and \$175,835.75 to personal property.

Wherefore, your trustee prays his Petition be heard by the Referee and that upon hearing all parties in interest an appropriate Order be made in the premises.

Dated: May 23, 1955.

/s/ GEORGE T. GOGGIN,
Trustee in Bankruptcy.

ROBERT H. SHUTAN, and
CRAIG, WELLER &
LAUGHARN,

By /s/ HUBERT F. LAUGHARN,
Attorneys for Trustee.

Notice

To County of Los Angeles, State of California,
and/or H. L. Byram, County Tax Collector;
Harold W. Kennedy, County Counsel. Attention:
Mr. Andrew O. Porter, Counsel;

To United States of America and/or Director of
Internal Revenue. Attention: Eugene Harpole,
Counsel;

To Jefferson Standard Life Insurance Company.
Attention: Meserve, Mumper & Hughes, and
Leo Anderson, Counsel;

To John W. Lytle Corporation. Attention: Brown,
Hamill & Hunt, and Stanley K. Brown, Counsel;

You Are Hereby Notified that the trustee has
filed his within Petition and the Referee has set

the same for hearing for determination in his court room, 340 Federal Building, Temple and Spring Streets, Los Angeles, California, on June 8, 1955, at the hour of 10 a.m. thereof.

Dated: May 23, 1955.

Duly verified.

[Endorsed]: Filed May 25, 1955, Referee. [7]

[Title of District Court and Cause.]

MEMORANDUM BY REFEREE AND ORDER
TRUSTEE v. VARIOUS LIENHOLDERS

Upon the trustee's Petition to Determine the Priority of Liens, several questions have been raised by the responding parties. In this memorandum I will attempt to settle only one matter.

The Director of Internal Revenue asks that the Jefferson Standard Life Insurance Company be required to proceed by foreclosure against certain property subject to its trust indenture and chattel mortgage which was transferred prior to bankruptcy by the bankrupt to the Times Mirror Company. This transfer was made subject to the "lien if any" of the chattel mortgage of Jefferson. The consideration given by the Times Mirror Company was \$275,000. There was no provision that the Times Mirror Company was to assume the chattel mortgage, nor has any evidence been offered that

the purchase price was reduced because of the chattel mortgage.

In the marshaling of liens we must apply the [9] equitable rule which requires the senior lienor to resort first to that part of his security against whom junior lienors have the least interest. Section 2899 of the California Civil Code states the rule. Without going into detail, may I state that my research and the study of cases cited to me, has not disclosed a case where a senior lienor has been required to pursue property into the hands of a transferee before he could realize on the security still in the hands of the mortgagor. Under certain circumstances he may do so, *Epperson v. Cappelino*, 113 C.A. 473, but he is not required to take this action as a prerequisite to proceeding against other security. The rule, in general, is limited to the proper apportionment between several funds in the hands of the obligor.

I conclude that there is no duty cast on Jefferson to pursue a lien against property transferred after its lien was created before it can realize on property in the possession of the bankrupt which later passed to the trustee.

Inasmuch as that property has been sold for more than the claim of Jefferson, and the claim of Jefferson has been transferred to the moneys received from the sale and no further impediment to distribution appears, I direct that the claim of Jefferson as to principal and interest until the date

of bankruptcy be paid forthwith when this order becomes final.

The matter of interest after bankruptcy is a question which I reserve for later decision.

Unless formal findings and conclusions are requested by a party in interest, this may be considered as a final order.

Dated this 15th day of August, 1955.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed Aug. 15, 1955, Referee. [10]

[Title of District Court and Cause.]

SUPPLEMENTAL ORDER

The Referee having heretofore made his Memorandum and Order dated August 15, 1955, upon the Petition of George T. Goggin, trustee, to determine priorities of liens, and thereafter and on August 19, 1955, the Referee having received a written communication from Andrew O. Porter, Deputy County Counsel, representing H. L. Byram, County Tax Collector, requesting that a Supplemental Order be made requiring a withholding until further determination by the Referee of the amount of the tax lien claim of said H. L. Byram, County Tax Collector, in the amount of \$15,384.10 from the payment as authorized to the Jefferson Standard Life

Insurance Company as encumbrance holder until the rights of the said County Tax Collector and the said Jefferson Standard Life Insurance Company are determined by final Order in and to the said fund; and

The trustee having agreed with the Director of Internal Revenue that a Supplemental Order be made herein reserving to the Director of Internal Revenue any and all of the respective liens, claims and charges of the Director of Internal Revenue against and upon the assets sold by the bankrupt to the Times-Mirror Company on December 18, 1954, and/or upon any funds recovered by [11] the trustee in any subsequent proceedings herein from the said purchaser; likewise reserving to the said Director of Internal Revenue any and all of its claims to priority and/or liens upon the assets so sold or any recovery by the trustee in connection therewith as aforesaid;

Now, Therefore,

It Is Ordered that the two said reservations and positions be and the same hereby are approved in this Supplemental Order to the said Order of the Referee dated August 15, 1955.

There is also reserved to the Director of Internal Revenue any and all of its claims to priority and/or liens upon the said fund of \$15,384.10 which is being withheld from the payment to Jefferson Standard Life Insurance Company as set forth hereinabove.

Dated: August 29, 1955.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

The above Supplemental Order is hereby approved:

GEORGE T. GOGGIN,
Trustee;

By CRAIG, WELLER &
LAUGHARN;

By /s/ HURBERT F. LAUGHARN,
Attorneys for Trustee.

H. L. BYRAM,
County Tax Collector,

By /s/ ANDREW O. PORTER,
Deputy County Counsel.

R. A. RIDDELL,
Director of Internal Revenue;

By /s/ BRUCE I. HOCHMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 29, 1955, Referee. [12]

[Title of District Court and Cause.]

MEMORANDUM BY REFEREE

On April 27, 1955, an order was entered in this case authorizing the trustee to sell certain properties free and clear of the trust deed, chattel mort-

gage, liens and encumbrances described in the trustee's petition for said order. The order provided that the liens and encumbrances be transferred to the proceeds of the sale subject to the payment of certain costs to the bankrupt estate. This order was approved by all of the parties involved.

The properties were sold by the trustee at public auction; he made his return of sale showing that he received \$382,500.00 from the sale of the various parcels of real property and lots of personal property. On April 29, 1955, an order was made confirming the sale.

On May 25, 1955, the trustee filed a petition in which he asked for determination of the nature, extent, validity and priority of the various liens and encumbrances. Appearing in response to the petition were the Jefferson Standard Life [13] Insurance Company, the United States of America (Director of Internal Revenue), and the Los Angeles County Tax Collector. On July 12, 1955, a further order was made directing that the net proceeds of the sale be deposited with the Clerk of the Court and that the liens of the respondents be transferred to said fund. Other orders have been entered affecting the same subject matter, but I believe the petitions and orders outlined above sufficiently describe the proceedings leading up to the issues presented.

In its answer to the trustee's petition the United States of America demanded that the senior lienor,

Jefferson Standard Life Insurance Company, be required to proceed against certain properties, transferred by the bankrupt prior to bankruptcy, before it could assert a claim to the fund herein. After taking testimony on all matters, I determined this one issue adversely to the contention of the United States. Thereafter, the Jefferson Standard Life Insurance Company was paid its claim in full with interest to date of bankruptcy less \$15,384.10. This amount equals the claim of the County Tax Collector.

All other matters are presently in issue. I will outline, according to my understanding, the contentions of the parties and the facts upon which they are based.

The Jefferson Standard Life Insurance Company (hereafter referred to as Jefferson) acquired a lien against the real and personal property in question by a trust indenture, trust deed and chattel mortgage (Exhibit 2) which were recorded in Los Angeles County on December 1, 1945.

Los Angeles County assessed personal property taxes for the year 1954-55 against the bankrupt which became a lien on March 1, 1954, against the real property here in question in the amount of \$15,384.10. [14]

The Collector (now Director) of Internal Revenue, on March 14, 1952, received from the Commissioner of Internal Revenue an assessment list carrying an assessment against the bankrupt for

corporate income tax for the years 1943, 1944 and 1945 in the total amount, \$235,566.10. On December 20, 1954, the Director filed a Notice of Federal Tax Lien in the office of the County Recorder for Los Angeles County.

The principal question raised is the ranking of the priorities of the foregoing lien claimants. There is also the question of marshaling their liens between the proceeds from the sale of real property and personal property which may or may not become pertinent to a determination herein. And there is the question of post-bankruptcy interest on the claims.

In point of time the liens rank as follows: First, Jefferson; second, the United States; and third, the County of Los Angeles. The lien of the United States attached upon the receipt by the Collector of the assessment list on March 14, 1952, Sec. 3671, Internal Revenue Code of 1939. The lien of the United States is junior to the lien of Jefferson by reason of the provision of Section 3672, I.R.C., which excepts the lien of a mortgagee from the paramount lien of the United States. The lien of the County of Los Angeles is effective as of the date of March 1, 1954. This lien is junior to the lien of the United States because relative priorities are governed by the rule of "first in time, first in right." *United States v. City of New Britain, et al.*, 347 U.S. 81; *California State Department of Employment v. United States* (C.A. 9), 210 F. 2d 242. However, the lien of the County of Los Angeles, by

California law, is superior to the lien of Jefferson. *Dougherty v. Henarie*, 47 C. 9; *Courtney v. Byram*, 54 C.A. 2d 769. I quote from the opinion in the later case: [15]

“By statutory provision, as indeed by the harsh law of necessity, taxes have been made a first lien upon property. They are a primary obligation of the citizen, and the flow of this ‘life blood of government’ may not be interrupted. Generally, therefore, the obligation to pay taxes is superior to the obligation of private debts.”

This court is faced with the anomalous situation where Jefferson’s mortgage lien has priority over the tax lien of the United States, and the tax lien of the County supersedes the mortgage lien and the fund is insufficient to satisfy the claims of all three parties. I have paraphrased the foregoing statement from the language used by Judge McLaughlin in *Smith v. United States, et al.* (D.C. Hawaii), 113 F. Supp. 702, a case which is remarkably close to this case in its factual aspects. In his opinion (p. 710, et seq.) he considers all of the prior decisions beginning with *Ferris v. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 A. 577, and *Brown v. General Laundry Service*, 139 Conn. 363, 94 A. 2d 10. In both of these cases the courts determined that by taking rank after a mortgagee by the provisions of 26 U.S.C. 3672 (now 6323) the United States also subordinated itself to those lienors who are superior to its immediate superior. The Brown

case was reversed by the Supreme Court in *United States v. City of New Britain*, 347 U.S. 81. The court held that any excess over the amount of the mortgage was subject to the federal lien. As to the question between the mortgagee and the state, the court said that the United States was not interested and that the answer depended on state law.

At this point the United States is eliminated. They are entitled to all of the fund after satisfaction of the lien of Jefferson. This leaves the one issue: Is the county entitled [16] to have its lien paid out of the funds set aside for the satisfaction of the lien of Jefferson? Returning to *Smith v. United States, et al.* (supra), we find that Judge McLaughlin refers to the dicta of Chief Justice Taft in the case of *Spokane County v. United States*, 279 U.S. 80, at p. 91:

“Moreover it is contended by the government that the relative priorities could have been maintained in that case (*Chic-Mint Gum Co.* case) by setting apart sufficient funds to pay the mortgage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart.”

and to the case of *Hopkins v. Eureka Coal Co.*, 33 Am. Fed. Tax Rep. 1627, in which the court adopted the solution suggested in the quotation above. Following the reasoning of Justice Taft's dicta, Judge McLaughlin concluded that the fund set aside for the satisfaction of the mortgage should be charged with payment of the territorial tax liens before being applied to the mortgage claim.

This appeals to me as being the most equitable result that could be accomplished. After the United States is satisfied in this case, I see no reason why the priorities of the remaining lienors should not follow the dictates of state law. As I have observed heretofore, the law of California gives the county preference over private debts (in this case a trust deed).

For the reasons I have stated, I conclude that the priorities in the impounded fund are to be ranked as follows:

First: Costs of Sale and Administration;

Second: The claim of Jefferson;

Third: The claim of the United States.

Out of the sum set aside for the payment of the Jefferson claim, the lien of the county shall first be satisfied and the [17] remainder paid over to Jefferson (which has already been done).

In this memorandum, I will not discuss at any length the question of interest on secured obligations. Before the decision of our Court of Appeals in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10, the Bankruptcy Court allowed interest on secured claims to the extent that the security was sufficient to cover its payment; *United States v. Sampsell*, 153 F. 2d 731. In footnote 4 of its decision in the *Beecher* case, the Court of Appeals held that *U. S. v. Sampsell* had been overruled by the Supreme Court in *Vanston Bondholders Committee v. Green*, 329 U.S. 156, and in its main opinion held that post-bankruptcy interest was not allowable unless

it came under two qualifications to the rule, (1) that the estate was fully solvent, or (2) that the security yielded income which could be applied to the interest claim. This holding is further qualified by the statement that "The only times in which the majority of modern cases have allowed interest after bankruptcy on secured claims is when the courts have discovered equitable reasons for doing so * * *." In the instant case, the properties subject to the liens of the parties herein were promptly appraised and sold. The three parties in interest consented to liquidation by the trustee and any other course would have been to the detriment of the lienors. No lien creditor was delayed in its access to its security. It follows that no equitable reason, within the meaning of the Beecher case, has come into existence which would justify a departure from the general rule set out in that case. I have read the cases cited from other circuits, particularly *U. S. Trust Co. v. Zelle* (C.A. 8), 191 F. 2d 822, and *Macomb Trailer Coach, Inc. (Weeks v. McInnis)* (C.A. 6), 200 F. 2d 611, and I agree that those cases support the position of lienors herein regarding post-bankruptcy interest. In the *Matter of [18] Pollard Bros.*, 128 F. Supp. 818, Judge Peirson M. Hall of this court held that he was bound by the Beecher case, although he had previously ruled to the contrary in the *Matter of Ridgecrest Development Co.*, 129 F. Supp. 708. All of the recent decisions on this matter cite and consider the case of *Vanston Bondholders Committee v. Green*, *supra*. Our Court of Appeals has placed its own interpre-

tation on that case which is at variance with the holdings of other circuits. Only the Supreme Court can settle the differences that have arisen. At the present time, I feel that I am in the same position as Judge Hall was in the Pollard case, that I must accept and follow the rule set out in the Beecher case. Post-bankruptcy interest is disallowed on all claims under consideration herein.

In view of my rulings herein, the question of allocation of the proceeds of sale between the real and personal property has become moot. In event that it does become relevant, I direct that the proceeds be apportioned between real and personal property in the ratio that the official appraisals of those properties bear to each other.

Another question remains which has become moot in view of my rulings and that concerns the marshaling of liens. It is clear that Jefferson and the United States should be paid first out of the proceeds of personal property before they are paid out of the proceeds of real property against which the County lien is solely based.

Unless findings and conclusions are waived, they shall be prepared by counsel for the United States, served and presented to the court, together with an appropriate order to be entered. Local Rule 7a.

Dated this 6th day of January, 1956.

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 6, 1956, Referee. [19]

United States District Court, Southern District
of California, Central Division

No. 64,381-WB

In the Matter of:

STOCKHOLDERS PUBLISHING COMPANY,
INC., a Corporation,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

In response to the petition of George T. Goggin, Trustee, to determine the priorities of liens, the Trustee, George T. Goggin, appeared by his counsel, Craig, Weller and Laugharn, and Robert Shutan; Jefferson Standard Life Insurance Company appeared by Meserve, Mumper & Hughes, by Leo Anderson, its attorneys; H. L. Byram, County Tax Collector, appeared by Andrew O. Porter, Deputy County Counsel, his attorney, and the United States of America appeared by Bruce I. Hochman, Assistant United States Attorney for the Southern District of California, and Eugene Harpole, Attorney, Internal Revenue Service. Evidence, oral and documentary, was received, and the Court, having considered said evidence and the statements of counsel, and having heretofore on the 15th day of August, 1955; the 29th day of August, 1955, and the 6th day of January, 1956, rendered memorandum opinions, now, therefore, from the evidence before the Court, makes the following [20]

Findings of Fact

I.

On or before the 1st day of December, 1945, Stockholders Publishing Company, Inc., a Nevada corporation, the bankrupt herein, made, executed and delivered a trust indenture, deed of trust, assignment, and chattel mortgage to Julian Price, trustee, to secure an indebtedness of \$1,000,000.00 to Jefferson Standard Life Insurance Company, which document was on said December 1, 1945, recorded as a deed, mortgage, power of attorney, trust deed, assignment, and chattel mortgage in Book 22587, page 13, Official Records of Los Angeles County, California.

II.

That said trust indenture, deed of trust, assignment and chattel mortgage covered property belonging to the bankrupt which said bankrupt transferred to the Times-Mirror Company on December 18, 1954, for a consideration of \$275,000.00, as well as that personal property sold on March 4, 1955, free and clear of liens in this bankruptcy proceeding for \$49,995.04, which sale was confirmed on March 4, 1955, and that real and personal property sold, on April 27, 1955, free and clear of liens, in this bankruptcy proceeding for \$382,500.00, which sale was confirmed on April 29, 1955, and all liens upon said property so sold were transferred to the proceeds of its sale without impairment. That Jefferson Standard Life Insurance Company has at all times co-operated with the trustee of said bank-

rupt estate and has taken no action to delay or hinder any sale of the assets of said bankrupt estate or the payment of the principal of and interest on its claim. [21]

III.

The indebtedness of Stockholders Publishing Company to Jefferson Standard Life Insurance Company secured by said trust indenture, deed of trust, assignment, and chattel mortgage was \$351,-223.74, inclusive of interest, plus attorneys' fees, on December 31, 1954, the date that the petition in bankruptcy was filed herein.

IV.

That on the 14th day of March, 1952, the Collector of Internal Revenue at Los Angeles, California, received the Commissioner of Internal Revenue's assessment list carrying assessments of 1943, 1944 and 1945 corporate income and excess profits taxes that had been made against Stockholders Publishing Company on March 11, 1952. The Collector of Internal Revenue issued notices and demands for the payment of said taxes on March 18, 1952. Notwithstanding said notices and demands for payment the sum of \$280,800.10, inclusive of interest accrued to December 31, 1954, of said 1943, 1944 and 1945 corporate income and excess profits taxes remains assessed, unpaid and outstanding. That on February 22, 1954, and May 13, 1954, withholding and Federal Insurance Contribution taxes for the fourth quarter 1953 and first quarter 1954 were assessed, and the same had been paid, with the exception

that a 5% penalty has been added thereto for failure to make payment within 10 days after notice and demand. The unpaid amounts of said penalties existing on December 31, 1954, and presently is the sum of \$7,808.48. Notices of lien securing payment of said taxes to the United States of America was filed in the office of the County Recorder of Los Angeles County, California, by the District Director of Internal Revenue (successor to the Collector of Internal Revenue) on December 20, 1954. [22]

V.

Los Angeles County, California, assessed real and personal property taxes for the year 1954-55 against the property of the bankrupt in the sum of \$15,384.10 which became a lien upon the four parcels of real estate described in the Trustee's Petition to Sell Real and Personal Property Free and Clear of Liens and to Determine Relative Priorities, on March 1, 1954. That said liens were transferred to the proceeds of the sale and remain unpaid.

VI.

From the proceeds of the property sold on April 27, 1956, Jefferson Standard Life Insurance Company was, on September 1, 1955, paid the sum of \$335,839.64, representing \$334,558.57, the principal of its claim, plus \$16,665.17 representing interest to December 31, 1954, less the tax claim of Los Angeles County in the amount of \$15,384.10, and its attorney, Leo Anderson, was paid \$3,500.00 as attorneys' fees allowed herein in addition to the

principal and interest on December 20, 1955. These payments constitute full payment of all indebtedness secured by the said Trust Indenture, Deed of Trust and Chattel Mortgage, with interest to the date of bankruptcy herein, except for the sum of \$15,384.10, which has been set aside to cover the claim of H. L. Byram, the Los Angeles County, California, Tax Collector, for 1954-1955 property taxes, and is presently in the custody of the Court. If additional funds are recovered by the trustee of this bankrupt from assets covered by and subject to the lien of Jefferson Standard Life Insurance Company, such additional amounts remaining after payment of the claim of the United States of America shall be applied to pay Jefferson Standard Life Insurance Company the said sum of [23] \$15,384.10.

VII.

The proceeds from the sale of real property and those from the proceeds of personal property on April 27, 1955, bear the same ratio to each other that the official appraisals of such properties bear to each other.

From the foregoing Findings of Fact, the Court draws the following

Conclusions of Law

I.

That the trust deed herein securing the indebtedness due to the Jefferson Standard Life Insurance Company, recorded December 1, 1945, in Book

22587, page 13, Official Records of Los Angeles County, contains an absolute obligation that the trustor (the bankrupt herein) must pay all taxes and assessments promptly when due (Book 22587 at pages 24-25, Official Records).

II.

Neither Jefferson Standard Life Insurance Company, the County of Los Angeles, the United States of America, nor any other creditor of Stockholders Publishing Company is entitled to payment of interest upon the amounts owing to them for any period subsequent to the 31st day of December, 1954, the date upon which the petition in bankruptcy was filed herein.

III.

That the order of priority in the funds derived from the sale herein of April 27, 1955, is as [24] follows:

1. The sum of \$351,223.74 due Jefferson Standard Life Insurance Company and the further sum of \$3500.00 as an attorneys' fee to its counsel, Leo Anderson;
2. The costs of sale and administration;
3. The lien claim of the United States for income and excess profits taxes in the sum of \$280,800.10, plus the sum of \$7,808.48 in non-payment penalties upon withholding and Federal insurance

contribution taxes for the fourth quarter 1953 and first quarter 1954.

4. Jefferson Standard Life Insurance Company has a valid lien to the extent of \$15,384.10, but the amount of said lien shall be deducted from the sum of \$351,223.74 as set forth in Conclusions of Law IV hereinbelow.

IV.

That from the sum of \$351,223.74 set aside for Jefferson Standard Life Insurance Company from the proceeds of the sale of April 27, 1955, the amount of \$15,384.10 should be paid over to H. L. Byram, the Tax Collector for the County of Los Angeles, State of California, in satisfaction of the 1954-1955 property tax levied upon the assets of the bankrupt and when this is done the bankrupt's liability to Jefferson Standard Life Insurance Company will have been fully satisfied unless additional amounts are recovered by the trustee as provided in Paragraph VI of the foregoing Findings of Fact.

Order

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed: [25]

1. That the sum of \$335,839.64 was properly paid to Jefferson Standard Life Insurance Company under its trust indenture, deed of trust and chattel mortgage;

2. That from funds that otherwise would have been payable to said Jefferson Standard Life Insurance Company the sum of \$15,384.10 shall be paid to H. L. Byram, County Tax Collector of Los Angeles County, California, in satisfaction of the 1954-1955 property tax assessed upon the assets of the bankrupt herein, but said sum of \$15,384.10 shall be paid to said Insurance Company if said trustee recovers funds from assets subject to the lien of said Insurance Company in addition to those required to pay the claim of the United States of America;

3. That the sum of \$3500.00 paid to Leo Anderson on December 20, 1955, is the full compensation due the attorney for Jefferson Standard Life Insurance Company for services to July 7, 1955.

4. That none of the creditors of Stockholders Publishing Company are entitled to interest upon their claims after the filing of the petition in bankruptcy herein on December 31, 1954; and

5. That after the payment of the costs of sale and administration appertaining to the assets sold herein on the 27th day of April, 1955, the balance of the proceeds from said sale be paid to the United States of America for application upon the assessed and [26] unpaid corporation income and excess profits taxes of Stockholders Publishing Company for the taxable years 1943, 1944 and 1945, and non-payment of 5% penalties upon the fourth quarter 1953 and first quarter 1954 withholding and Federal insurance contribution taxes.

Dated: This 20th day of February, 1956.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Approved as to Form:

CRAIG, WELLER &
LAUGHRAN, and
ROBERT SHUTAN,

By /s/ HUBERT F. LAUGHRAN,
Attorneys for Trustee.

MESERVE, MUMPER &
HUGHES,

By /s/ LEO ANDERSON,
Attorneys for Jefferson Standard Life Insurance
Company.

HAROLD W. KENNEDY,
County Counsel,

By /s/ ANDREW O. PORTER,
Deputy County Counsel, Attorney for H. L. Byram,
County Tax Collector, Los Angeles County.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant U. S. Attorney;

EUGENE HARPOLE,
Attorney, Internal Revenue
Service,

By /s/ EUGENE HARPOLE,
Attorneys for United States
of America.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 20, 1956. Referee. [27]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To Honorable David B. Head, Referee in Bankruptcy:

Comes Now, Jefferson Standard Life Insurance Company, a corporation, and presents its petition for review herein by Honorable William M. Byrne, Judge of the above-entitled court, as follows:

1. The orders of which petitioner complains are those Findings of Fact, Conclusions of Law and Order made and entered herein on or about February 20, 1956, a true copy of the same being attached hereto as Exhibit "A" and by this reference incorporated herein.

2. Being a mortgage lien claimant herein in the principal amount of \$334,558.57, plus interest to December 31, 1954, in the amount of \$16,665.17, plus interest at the rate of \$43.859 per day from

said date to September 1, 1955, in the sum of \$10,657.74, petitioner is especially aggrieved by the said orders, as hereinafter alleged. [29]

3. Petitioner alleges said orders to be erroneous in the following respects:

(1) Said orders erroneously and inequitably deny petitioner's claim for interest after December 31, 1954, the date of filing of the petition in bankruptcy.

(2) Said orders erroneously and inequitably subordinate payment of petitioner's claim, to the extent of \$15,384.10, to payment of claim of the County of Los Angeles for real and personal property taxes and the claim of the United States for income and excess profits taxes and penalties on withholding and federal insurance contribution taxes.

(3) Said orders erroneously and inequitably deny to petitioner's lien priority over the liens of the County of Los Angeles and the United States.

(4) Said orders erroneously and inequitably give the lien of the United States priority over the lien of petitioner to the extent of \$15,384.10.

(5) Said orders erroneously and inequitably give the lien of the County of Los Angeles priority over the lien of petitioner.

(6) The Referee committed error in applying State law to determine the priority of the liens of petitioner and the County of Los Angeles.

(7) The Referee committed error in determining that the law of California gives the lien of the County of Los Angeles for real and personal property taxes an absolute priority over the lien of petitioner's mortgage and deed of trust.

(8) Said orders erroneously give the lien of the County of Los Angeles for real and personal property taxes priority over the lien of the United States for income and excess profits taxes. [30]

(9) Paragraph VI of the said Findings of Fact is erroneous as and to the extent hereinabove alleged.

(10) Paragraphs II, III and IV of the said Conclusions of Law are erroneous as and to the extent hereinabove alleged.

(11) Paragraphs 2, 4 and 5 of the said Order are erroneous as and to the extent hereinabove alleged.

(12) The evidence does not support the said Findings of Fact insofar as the same are erroneous as hereinabove alleged.

(13) The evidence and Findings of Fact do not support the Conclusions of Law.

Wherefore, petitioner prays for review of said orders by the District Judge, that said orders be vacated and set aside insofar as they deny petitioner's claim for interest after December 31, 1954, and subordinate its claim to the extent of \$15,384.10 to the claims of the United States and the County

of Los Angeles, and that the matter be recommitted to the Referee with directions to order payment to petitioner forthwith of said sum of \$15,384.10 and interest on its claim from December 31, 1954, to the date of payment in the amount of \$10,657.74.

Dated: March 15, 1956.

JEFFERSON STANDARD LIFE INSURANCE
COMPANY, a Corporation,

By MESERVE, MUMPER &
HUGHES and

LEO E. ANDERSON,
Its Attorneys,

By /s/ LEO E. ANDERSON.

Duly Verified.

Affidavit of Mail attached.

[Endorsed]: Filed March 15, 1956. [31]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable William M. Byrne, Judge of
the United States District Court, Southern
District of California, Central Division:

I, David B. Head, Referee in Bankruptcy in this
court, do certify as follows:

In the above-entitled matter it was ordered that
the trustee sell certain assets of the bankrupt and

that purported liens be transferred to the proceeds of sale. Upon a petition filed by the trustee, proceedings were had to determine the respective rights of the Jefferson Standard Life Insurance Company, the United States of America (Director of Internal Revenue) and the Tax Collector for Los Angeles County.

This matter was heard and on January 6, 1956, I filed a memorandum in which I discussed and determined the issues. Findings of Fact, Conclusions of Law and an Order were thereafter entered. From this order the Jefferson Standard Life Insurance Company, and the Tax Collector for Los Angeles County [42] have petitioned for review.

My memorandum states the questions involved in the review.

I further certify the following documents from my file:

1. Order authorizing Trustee to Sell Real and Personal Property Free and Clear of Liens;

2. Petition re Liens and Notice Thereon;

3. Memorandum by Referee and Order—Trustee vs. Various Lienholders;

4. Supplemental Order;

5. Memorandum by Referee;

6. Findings of Fact, Conclusions of law and Order;

7. Petition for Review—Jefferson Standard Life Insurance Company;

8. Petition for Review—H. L. Byram, County Tax Collector;

9. Reporter's Transcript of Testimony and Exhibits:

United States' No. 1 to 5, inclusive, (Except No. 3 which Trustee will furnish, if needed);

County of Los Angeles' No. 1; Jefferson Standard Life Insurance Company's No. 1.

Dated: April 19, 1956.

Respectfully submitted,

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Endorsed]: Filed April 19, 1956, Referee. [43]

July 20, 1956.

Robert H. Shutan and
Craig, Weller & Laugharn,
817, 111 West 7th St.,
Los Angeles 14, Calif.

Eugene Harpole,
Bruce I. Hochman,
Asst. U. S. Attorneys,
808 Federal Bldg.,
Los Angeles 12, Calif.

Harold W. Kennedy,
Co. Counsel;
A. O. Porter,
Dep. Co. Counsel;
1100 Hall of Records,
Los Angeles, Calif.

Meserve, Mumper & Hughes,
Leo E. Anderson,
612 S. Flower St.,
Los Angeles 17, Calif.

Re: Stockholders Publishing Co., Inc.,
64,381-WB, Bkey,

Please be advised that the Court this date entered the following order in the above matter:

“Referee’s Order Is Affirmed.”

Counsel for Trustee in Bankruptcy is ordered to prepare, serve and lodge formal order pursuant to Local Rule 7.

JOHN A. CHILDRESS,
Clerk. [44]

[Title of District Court and Cause.]

MINUTES OF THE COURT
JULY 20, 1956

Present: Hon. Wm. M. Byrne, District Judge;

Proceedings:

Entered order affirming order of Referee re petition of Jefferson Standard Life Ins. Co. Mailed notice to counsel.

JOHN A. CHILDRESS,
Clerk. [45]

In the District Court of the United States for the
Southern District of California, Central Division

No. 64381-WB

In the Matter of

STOCKHOLDERS PUBLISHING COMPANY,
INC., a Corporation,

Bankrupt.

ORDER AFFIRMING ORDER OF
DAVID B. HEAD

February 20, 1956

Petition for Review of certain order made in the above-entitled proceedings by Referee David B. Head, dated February 20, 1956, having been duly filed herein by the Jefferson Standard Life Insurance Company and by H. L. Byram, County Tax Collector of the County of Los Angeles, and the said Petitions for Review coming on for hearing and determination on June 4, 1956, at the hour of 2 p.m., and the Petitioner, Jefferson Standard Life Insurance Company, appearing by Meserve, Mumper and Hughes, its Attorneys, by Leo E. Anderson, and the Petitioner H. L. Byram, County Tax Collector, appearing by his attorney, Harold W. Kennedy, County Counsel, by Andrew O. Porter, Deputy County Counsel, and George T. Goggin, the Trustee, appearing by Craig, Weller and Laugharn, by Hubert F. Laugharn, his attorney, and the United States of America, (Direc-

tor of Internal Revenue) appearing by its attorney, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant U. S. Attorney, Chief, Tax Division, by Bruce I. Hochman, Assistant United States Attorney, and [46]

Points and Authorities having been filed by respective Parties, and orally argued by the respective Attorneys,

Now Therefore, It Is Ordered that the Order of Referee David B. Head, dated February 20, 1956, be, and the same hereby is affirmed and the findings of fact and conclusions of law as made by the Referee in support thereof are hereby adopted by the Court.

Dated: August 13, 1956.

/s/ WM. M. BYRNE,
U. S. District Judge.

Approved as to Form:

GEORGE T. GOGGIN,
Trustee;

By CRAIG, WELLER &
LAUGHARN,

By /s/ HUBERT F. LAUGHARN,
Attorney for Trustee.

H. L. BYRAM,
County Tax Collector,
Los Angeles, Calif.

By HAROLD W. KENNEDY,
County Counsel.

By /s/ ANDREW O. PORTER,
Deputy County Counsel.

JEFFERSON STANDARD
LIFE INS. CO.,

By MESERVE, MUMPER &
HUGHES,

By /s/ LEO E. ANDERSON,
Its Attorney.

UNITED STATES OF
AMERICA,
(Director of Internal
Revenue) ;

By LAUGHLIN E. WATERS,
United States Attorney;

By /s/ EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division.

[Endorsed]: Filed August 13, 1956, U.S.D.C.

Docketed and entered August 14, 1956. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jefferson Standard
Life Insurance Company, a corporation, claimant,

hereby appeals to the United States Court of Appeals for the 9th Circuit from that certain Order entered in the above-entitled matter on or about August 14, 1956, on appellant's petition for review, affirming Findings of Fact, Conclusions of Law, and Order of Referee David B. Head made and entered on or about February 20, 1956, and from the whole thereof.

This notice is given pursuant to Rule 73, FRCP.

MESERVE, MUMPER &
HUGHES,

By /s/ LEO E. ANDERSON,
Attorneys for Jefferson Standard Life Insurance
Company, a Corporation, Appellant.

[Endorsed]: Filed September 6, 1956, [48]
U.S.D.C.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

To Appellees, United States of America and Laughlin E. Waters, United States Attorney; H. L. Byram, County Tax Collector of Los Angeles County, and Harold W. Kennedy, County Counsel; and George T. Goggin, Trustee, and Craig, Weller & Laugharn, His Attorneys:

Pursuant to Rule 75 (d) FRCP, appellant Jefferson Standard Live Insurance Company, a cor-

poration, hereby states that the following are the points on which it intends to rely in its appeal:

1. The Referee's orders erroneously and inequitably denied appellant's claim for interest after the date of filing of the petition in bankruptcy.

2. Said orders erroneously and inequitably subordinated payment of appellant's claim to the extent of \$15,384.10, to payment of the claim of the County of Los Angeles for real and personal property taxes and the claim of the [49] United States for income and excess profit taxes and penalties on withholding and federal insurance contribution taxes.

3. Said orders erroneously and inequitably denied to appellant's lien priority over the liens of the County of Los Angeles and the United States.

4. Said orders erroneously and inequitably gave the lien of the United States priority over the lien of appellant to the extent of \$15,384.10.

5. Said orders erroneously and inequitably gave the lien of the County of Los Angeles priority over the lien of appellant.

6. The Referee committed error in applying state law to determine the priority of the liens of appellant and the County of Los Angeles.

7. The Referee committed error in determining that the law of California gave the lien of the County of Los Angeles for real and personal prop-

erty taxes priority over the lien of appellant's mortgage and deed of trust.

8. Said orders erroneously gave the lien of the County of Los Angeles for real and personal property taxes priority over the lien of the United States for income and excess profits taxes and penalties on withholding and federal insurance contribution taxes.

MESERVE, MUMPER &
HUGHES,

By /s/ LEO E. ANDERSON,
Attorneys for Jefferson Standard Life Insurance
Company, a Corporation, Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 6, 1956, [50]
U.S.D.C.

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Apr. 27—Fld Reply of Jefferson Standard Life Insurance Company to points and authorities of the Los Angeles County Tax Collector in support of Petition for Review.

Apr. 27—Fld Points and Authorities of Respondent, H. L. Byram County Tax Collector, on Petition for Review by Jefferson Standard Life Insurance Company.

1956

- May 1—Fld Reply Brief upon behalf of George T. Goggin, Trustee.
- May 1—Fld Affidavit of Service by Mail.
- Apr. 30—Fld Stip. and ord. thereon that Govt. hv. 10 das. to file its reply to pts. and auths. of Jefferson Srd. Life Ins. Co. on petn. for review.
- May 1—Fld Affidavit of Service by Mail. ten das. to file its reply to pts. & auths. of H. L. Byram, Co. Tax. Coll. of Co. of L. A. on petn. for review.
- May 10—Fld Government's Brief in support of Referee's order.
- May 11—Ent ord. for and placed on cal, on 6-4-56, 9:45 AM for hrg. on petn. of Jefferson Std. Life Ins. Co. for review of Ref's ord. of 2-20-56. Notif. counsel.
- June 4—Ent. proc. hrg. petn. Jefferson Std. Life Ins. Co. and Co. Tax Coll. of L. A. Co., for review of Ref's ord. of 2-20-56 & ent. ord. matter std. submitted.
- Aug. 13—Fld ord on petn for review affirm ord of Ref Head dtd 2-20-56 & adopt finds & Concls of Referee. (Ent 8-14-56). Not attys.
- July 20—Ent ord affirming ord of Ref re petn of Jefferson Std Life Ins. Co. ntfd counsel.
- Sept. 6—Fld Notice of appeal.
- Sept. 6—Fld Stipulation for costs on appeal.
- Sept. 6—Fld Statement of points on appeal.

1956

Sept. 6—Fld Designation of Record on appeal.

Sept. 19—Fld Additional Designation of Record on appeal by Appellee United States of America. [51]

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 64381-WB

In the matter of:

STOCKHOLDERS PUBLISHING CO., INC.,
Bankrupt.Before: Honorable David B. Head, Referee in
Bankruptcy.HEARING RE: ORDER TO SHOW CAUSE;
TRUSTEE VS. COUNTY TAX COLLECTOR,
DIRECTOR OF INTERNAL REVENUE,
ET AL.

The following is a stenographic transcript of the proceedings had in the above matter, which came on for hearing before the Honorable David B. Head, United States Referee in Bankruptcy, at his courtroom, 340 Federal Building, Los Angeles, California, at the hour of 10:00 o'clock a.m., on Wednesday, June 8, 1955.

* * *

The Referee: All right, we will proceed. Do any of the parties have evidence to offer?

Mr. Porter: Yes, your Honor.

Mr. Harpole: I have a certified copy of the recorded notice of tax lien, your Honor. I desire to offer it in evidence as the Exhibit No. 1 of the United States.

The Referee: All right. We will mark this as Exhibit 1.

Mr. Laugharn: Without reading that, Mr. Harpole, is that the instrument recorded on December 20th?

Mr. Harpole: December 20, 1954.

As Exhibit No. 2, I wish to offer by reference the chattel mortgage, the trust indenture and the [32*] trust deed of Jefferson Standard Life Insurance Company from the files.

As Exhibit 3, I desire to offer the minutes of the Stockholders Publishing Company of December 18, 1954, from the files.

The Referee: Let me identify that.

Mr. Harpole: They are the minutes of December 18, 1954.

The Referee: That is Trustee's Exhibit No. 2 of February 23rd.

That will be your Exhibit 3 in this matter.

Mr. Harpole: Yes; thank you.

I also desire to offer in evidence at this time by reference, paragraph 5 of the Trustee's petition to sell real and personal property free and clear of liens and to determine relative priorities. The date of the petition was March 22, 1955, signed by George T. Goggin, Trustee.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Referee: May I have that again? That is paragraph 5 of the petition to sell?

Mr. Harpole: Yes, paragraph 5. The date of the petition is March 22, 1955.

Now, may it be stipulated that an assessment list for the 1943, 1944 and 1945 Federal income taxes of Stockholders Publishing Company were received in the office of the Collector of Internal Revenue at Los Angeles [33] on the 14th day of March, 1952?

Mr. Laugharn: It is so stipulated. That is in the title report. I have checked that date a number of times.

Mr. Harpole: Do you other gentlemen go along with that stipulation? It is shown on the recorded notice. I could call a witness to testify on it in a few minutes.

Mr. Porter: Yes. I will so stipulate.

Mr. Harpole: Mr. Anderson, would you stipulate that the assessment list was received in the Office of the Collector of Internal Revenue on March 14, 1952?

Mr. Anderson: Yes.

Mr. Harpole: May it be stipulated that the notice and demand for payment of tax has been made on Stockholders Publishing Company?

Mr. Laugharn: I don't know about that. Is that a necessary element, Mr. Harpole?

Mr. Harpole: It is with a tax lien. I had perhaps better call a witness, if we may have three minutes.

The Referee: What would your witness testify to?

Mr. Harpole: That the notice of demand and payment of tax was sent to the Stockholders Publishing Company and that the tax has not been paid.

Mr. Laugharn: We will stipulate that he would so testify.

The Referee: Do you know that to be a fact, [34]
Mr. Harpole?

Mr. Harpole: I am so advised. I can get the exact date from the witness.

The Referee: It was prior to the filing?

Mr. Harpole: Prior to the filing.

The Referee: Does anyone want proof on that?

Mr. Anderson: No.

The Referee: Then, you are all stipulating?

Mr. Laugharn: On behalf of the Trustee, we will stipulate.

Mr. Porter: I will so stipulate.

Mr. Anderson: I will stipulate.

Mr. Harpole: That is all.

Mr. Porter: I would like to offer into evidence five tax bills of the County of Los Angeles addressed to Stockholders Publishing Company, Inc.

I would like to have counsel stipulate that they are true copies of the County tax roll except that these do not show any penalties as yet.

Mr. Harpole: We will so stipulate.

Mr. Laugharn: We will so stipulate.

Mr. Porter: These bills are, first, \$952.17; \$1,261.76; \$9,699.90; \$334.98 and \$3,235.29, plus penalties and interest that have accrued.

Mr. Shutan: Do you have a total on it?

Mr. Porter: No; I don't have a total. [35]

Mr. Laugharn: Plus penalties, did you say?

Mr. Porter: Yes.

The Referee: That will be marked the County's Exhibit No. 1.

Mr. Laugharn: Well, I don't suppose we have to take the Knox-Powell-Stockton case of the lien and the penalty and the interest attaching, do we?

That point is raised on behalf of the Trustee in the Trustee's petition on page 3. We asked that the Court take the computation if it becomes necessary to allocate the consideration of \$382,500 as to real property and personal property and the amount is set forth as \$206,664.25 to real property and \$175,-835.75 to personal property.

Those are the percentages based upon the actual offers on the first day of the sale, and then the blanket percentage to the blanket increase, as I understand it, on the second day.

I asked the Trustee's office to assemble that information.

The Referee: That is based upon the separate bids that were made and the raise that came the following day, I gather.

Mr. Laugharn: Yes.

Mr. Harpole: Another matter that I would like to have in the record is this: It isn't available, but I [36] think the Trustee is familiar with it. That is the contract for sale to the Times-Mirror Company by the Stockholders Publishing Company.

Mr. Laugharn: And possibly the resolution on that. Is that already in evidence?

Mr. Harpole: I offered the resolution.

Mr. Laugharn: I will produce that document then and it will be received here as an exhibit. It has been in court a number of times, and we just don't happen to have it here in this particular file.

The Referee: We will mark that as your Exhibit 5. Then, that will be furnished?

Mr. Laugharn: I will deliver it to the Court.

The Referee: Yes.

Mr. Anderson: Your Honor, I would ask that the parties here stipulate that the price received from the sale of assets is in excess of the claim of Jefferson Standard Life Insurance Company.

Mr. Harpole: It will be so stipulated.

The Referee: I can take notice of that.

Mr. Laugharn: Yes.

Mr. Anderson: Also, I would ask that the parties stipulate that Jefferson Standard Life Insurance Company has not taken any action which would delay or interfere with the orderly processes of this bankruptcy proceeding and the payment of its [37] claim.

Mr. Laugharn: Well, as far as the Trustee is concerned, we certainly don't make any contention that there has not been co-operation.

Mr. Anderson, was that going to some particular point?

Mr. Anderson: No. That was just the general point that we have co-operated and that we have not attempted in any way to delay the realization of funds with which to pay our claim or do anything which would delay the payment.

Mr. Harpole: We are not in a position to know, Mr. Anderson. We know nothing one way or the other. Our files are very skinny. Yours already are three times as big as ours, and the Trustee talks about his files being labeled by the filing cabinets.

We don't have any knowledge, so I don't think we can stipulate to that.

Mr. Anderson: If there can be no stipulation, I perhaps should testify to the fact that we have not——

The Referee: You are trying to prove a negative. You do not have to do that, do you?

Mr. Anderson: Except that I think in this matter there should be a finding as to whether or not we have done anything which, in equity, should prevent us from computing interest to the date of payment if this matter goes over to another year. We are fighting it out with [38] the Times. It is nothing that is our fault.

The Referee: We will consider your statement as having been made as an officer of the Court and we can give it full weight, unless someone wishes to say otherwise.

Mr. Anderson: If anyone wants to have me sworn before I make the statement, I will be sworn and repeat the statement.

The Referee: I don't think that is necessary.

Mr. Porter: May I state to the Court that my failing to argue any points is not a waiver of those points.

The Referee: No; there are no waivers here.

Mr. Anderson: I don't know that I will need to offer in evidence our claim.

The Referee: I think that——

Mr. Anderson: It probably should be done.

The Referee: I think that Mr. Harpole has offered about everything you would offer. That is your trust indenture, the trust deed and the chattel mortgage, and so we will consider it in evidence for all purposes.

Mr. Anderson: The claim will be included in that exhibit?

The Referee: Yes.

Mr. Harpole: I will join with the stipulation that the claim may be put in as an exhibit, too. [39]

The Referee: We will consider the whole claim.

* * *

Mr. Anderson: I have one more matter, your Honor.

I have here a declaration of default which was furnished to the Stockholders Publishing Company by the Title Insurance and Trust Company, as trustee, and dated [40] December 23, 1954.

May it be stipulated that the declaration of default was furnished to the Stockholders Publishing Company by the Title Insurance and Trust Company, as trustee?

Mr. Harpole: Can we put the declaration of default in evidence?

Mr. Anderson: Yes.

Mr. Harpole: We will stipulate to that.

Mr. Anderson: That was furnished to Stock-

holders Publishing Company prior to January 1, 1955.

Mr. Harpole: As to the date, I will leave that to the trustee.

The Referee: It will be Jefferson Standard Insurance Company's Exhibit 1.

Mr. Anderson: I would need time to bring Mr. Dunlap here to testify as to the date when that was given to Stockholders Publishing Company.

Mr. Laugharn: Do you know the date yourself, Mr. Anderson?

Mr. Anderson: Not offhand. I may have it in my file.

Mr. Laugharn: Do you have a letter of transmittal? If we could shorten that in any manner with Mr. Anderson's statement, we will take it, and on behalf of the Trustee we will stipulate to it. [41]

The Referee: There is nothing on this declaration of default which indicates when it was mailed.

Mr. Anderson: That is just an executed copy.

The Referee: Did you get a bill from the title company?

Mr. Anderson: I beg your pardon?

The Referee: If you got a bill from the title company, maybe that will show the date.

Mr. Anderson: Yes; I have a letter here from the Title Insurance and Trust Company, dated December 23, 1954, advising me that the declaration of default was forwarded to the Stockholders Publishing Company on that date, which is December 23, 1954.

Mr. Laugharn: December 23rd?

Mr. Anderson: Yes; December 23, 1954. If counsel will stipulate that that declaration was forwarded to Stockholders Publishing Company on that date, that will avoid the necessity of bringing anyone here to testify.

Mr. Harpole: May I see that declaration of default, please, Mr. Anderson?

Mr. Laugharn: We will so stipulate on behalf of the Trustee.

Mr. Porter: We will so stipulate for the County.

Mr. Harpole: Do you have the request that went to the title company or a copy of it to go along with this?

The Referee: I think we can assume that the title [42] company did not volunteer that, can't we?

Mr. Anderson: Yes; I have an executed copy here. I have here an executed copy of the request to the title company, as trustee, that they issue a declaration of default.

May I ask that that be made a part of Exhibit No. 1 for Jefferson Standard.

The Referee: Yes. [43]

* * *

UNITED STATES EXHIBIT No. 1

Form 668

U. S. Treasury Department

Internal Revenue Service

No. 19661

160559

Notice of Federal Tax Lien Under
Internal Revenue LawsUnited States Internal Revenue,
Los Angeles District—06

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer: Stockholders Publishing Co. Inc.

Residence or place of business: 1257 So. Los Angeles St., Los Angeles, California.

| Nature of Tax | Year or Taxable Period | Date Assessment List Received | Amount Assessment |
|-------------------------|---------------------------|----------------------------------|----------------------|
| Corp. Income | | | |
| 3-11 Spl 7 00C-52L..... | 1943 | 3/14/52 | \$ 36,024.95 |
| Corp. Income | | | |
| 3-11 Spl 7 06C-52L..... | 1944 | 3/14/52 | 51,944.00 |
| Corp. Income | | | |
| 3-11 Spl 7 08C-52L..... | 1944 | 3/14/52 | 53,676.40 |
| Corp. Income | | | |
| 3-11 Spl 7 10C-52L..... | 1945 | 3/14/52 | 93,920.75 |
| Total | | | <u>\$235,566.10</u> |

Witness my hand at Los Angeles, California, on
this, the 20th day of December, 1954.

R. A. RIDDELL,
District Director of
Internal Revenue;

By /s/ DAVID F. BOESHAAR,
Collection Officer.

(Note: Certificate of officer authorized by law to
take acknowledgements is not essential to the
validity of Notice of Federal Tax Lien(s).
G. C. M. 26419, 1950-1 C. B., 125.)

County Recorder
County of Los Angeles
Los Angeles, California

Notice of Tax Lien Filed at Request of Dir. of
Int. Rev. Dec. 20, 1954.

MAME B. BEATTY,
County Recorder.

State of California,
County of Los Angeles—ss.

I hereby certify the foregoing to be a full, true and correct copy of the original instrument filed for record December 20th, 1954. Document No. 2334.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, this 8th day of June, 1955.

MAME B. BEATTY,
County Recorder;

By /s/ THOMAS M. CROWLEY,
Deputy.

Admitted in evidence June 8, 1955.

JEFFERSON STANDARD'S EXHIBIT No. 1

Jefferson Standard Life Insurance Company
Greensboro, N. C.

December 21, 1954.

Air Mail

Mr. C. R. S. Dunlop
Title Insurance and Trust Company
433 South Spring Street
Los Angeles 13, California

Stockholders Publishing Company, Inc.
First Mortgage 4½% Bonds

Dear Mr. Dunlop:

Bonds and interest installments as follows are past due and unpaid:

| Due Date | Bond No. | Principal Amount | Interest Due |
|---------------|----------|------------------|--------------|
| 3-1-54 | 33 | \$12,500.00 | \$3,763.78 |
| 6-1-54 | 34 | 12,500.00 | 3,763.78 |
| 9-1-54 | 35 | 12,500.00 | 3,763.78 |
| 12-1-54 | 36 | 12,500.00 | 3,763.78 |

Because of this delinquency, we request that you, as substituted Trustee under the Trust Indenture and Chattel Mortgage dated as of December 1, 1925, executed by Stockholders Publishing Company, Inc., issue a declaration of default.

We certify that we own and hold all of the unpaid bonds of the issue consisting of Bonds numbered 33 through 58, each in the amount of \$12,500, and Bond No. 59 on which the principal balance unpaid is \$9,558.57; all the bonds aggregate \$334,558.57 par value.

Sincerely yours,

M. H. CROCKER,
Assistant Treasurer.

MHC:en

cc—Mr. Leo E. Anderson

DECLARATION OF DEFAULT

To: Stockholders Publishing Company, Inc., a corporation:

Whereas, heretofore and as of the first day of December, 1945, Stockholders Publishing Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Nevada, with one of its principal offices and places of business in the City of Los Angeles, County of Los Angeles, State of California (herein called "the Company"), and Julian Price, a resident of the City of Greensboro in the State of North Carolina, therein called "the Trustee," made and entered into a certain

Trust Indenture and Mortgage of Chattels given to secure the payment of an authorized issue of One Million Dollars (\$1,000,000.00) of bonds, all as specifically set forth in said Trust Indenture and Mortgage of Chattels, and

Whereas, said Trust Indenture and Mortgage of Chattels was recorded in the office of the County Recorder of Los Angeles County on December 1, 1945, in Book 22587, page 13 of Official Records of Los Angeles County, California, and

Whereas, thereafter and on December 23, 1946, "the Company" and Jefferson Standard Life Insurance Company, a corporation, appointed Title Insurance and Trust Company, a California corporation, as Successor Trustee, all as provided in said Trust Indenture and Mortgage of Chattels, which said appointment was thereafter and on December 30, 1946, recorded in the office of the County Recorder of Los Angeles County, California, in Book 24103, page 118 of Official Records, and since that time Title Insurance and Trust Company, a corporation, has been and still is the Trustee qualified and acting as Successor Trustee under said Trust Indenture and Mortgage of Chattels, and

Whereas, it is provided in said Trust Indenture and Mortgage of Chattels that if a default shall occur in the payment of the outstanding bonds when due, that then the Trustee may upon written request so to do by the holders of one-half or more in amount of the bonds then outstanding, shall de-

clare the principal of each and all of said bonds immediately due and payable regardless of the dates of maturity thereof and thereupon each and all of the said bonds shall be and become due immediately, and that "the Company" shall be notified of such defaults by the Trustee by written notice to that effect duly signed by the Trustee and thereupon either duly served upon "the Company" or duly mailed to it with postage prepaid thereon, and

Whereas, Jefferson Standard Life Insurance Company, a corporation, being the owner of all of the outstanding bonds, has in writing requested the Trustee to so declare the principal of each and all of the said bonds immediately due and payable because of the fact that default has occurred in that payment has not been received of the following described four outstanding bonds:

| Due Date | Bond No. | Principal Amount | Interest Due |
|---------------|----------|------------------|--------------|
| 3-1-54 | 33 | \$12,500.00 | \$3,763.78 |
| 6-1-54 | 34 | 12,500.00 | 3,763.78 |
| 9-1-54 | 35 | 12,500.00 | 3,763.78 |
| 12-1-54 | 36 | 12,500.00 | 3,763.78 |

Now Therefore, Title Insurance and Trust Company, as Successor Trustee, by reason of the aforesaid, does hereby declare the principal of each and all of the said bonds immediately due and payable, being bonds numbered 33 to 58, each in the amount of \$12,500.00 and Bond No. 59 in the amount of its unpaid principal balance in the sum of \$9,558.57, making a total aggregate par value of \$334,558.57,

and the Trustee does herewith give this written notice to that effect to "the Company."

In Witness Whereof, Title Insurance and Trust Company, as Successor Trustee, has caused this instrument to be executed by its duly authorized officers under its corporate seal, this 23rd day of December, 1954.

[Seal]

TITLE INSURANCE AND
TRUST COMPANY,

A Corporation, as Successor
Trustee;

By /s/ E. H. BOOTH, JR.,
Vice President;

By /s/ A. A. MARTIN,
Assistant Secretary.

State of California,
County of Los Angeles—ss.

On this 23rd day of December, 1954, before the undersigned, a Notary Public in and for said County and State, personally appeared E. H. Booth, Jr., known to me to be the Vice President, and A. A. Martin, known to me to be the Assistant Secretary of Title Insurance and Trust Company, the Corporation that executed the within instrument, as Successor Trustee, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to

me that such corporation executed the same as Successor Trustee.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ EDNA DEWHURST,
Notary Public in and for Said
County and State.

My Commission Expires March 4, 1957.

Admitted in evidence June 8, 1955.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify, that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 57, inclusive, containing the original:

Order Authorizing Trustee to Sell Real and
Personal Property Free and Clear of Liens;
Petition and Notice Thereon of George T.
Goggin;
Memorandum by Referee and Order;
Supplemental Order;
Memorandum by Referee;

Findings of Fact, Conclusions of Law and Order;

Petition for Review;

Referee's Certificate on Review;

Order Affirming Order of David B. Head;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Record on Appeal;

Additional Designation of Record on Appeal by U.S.A.;

and a full, true and correct copy of the Notification of Entry of Referee's Order; Minutes of the Court had on July 20, 1956; and a photostatic copy of the last docket sheet (docket entries);

B. 1 volume of reporter's transcript of proceedings had on June 8, 1955;

C. United States' exhibits 1-5, inclusive, Jefferson Standard's No. 1; and County Tax Collector's No. 1.

I further Certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 15th day of October, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15349. United States Court of Appeals for the Ninth Circuit. Jefferson Standard Life Insurance Company, a corporation, Appellant, vs. United States of America, H. L. Byram, County Tax Collector of Los Angeles County, and George T. Goggin, Trustee of Stockholders Publishing Company, Inc., a corporation, bankrupt, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 6, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 15349

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON STANDARD LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, H. L. BYRAM, County Tax Collector of Los Angeles County, and GEORGE T. GOGGIN, Trustee of Stockholders Publishing Company, Inc., a corporation, Bankrupt,

Appellees.

APPELLANT'S OPENING BRIEF.

MESERVE, MUMPER & HUGHES,
and

LEO E. ANDERSON,

Suite 700,
612 South Flower Street,
Los Angeles 17, California,

Attorneys for Appellant.

FILED

FEB 26 1957

PAUL P. O'BRIEN, CLERK



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No. 15349

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON STANDARD LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, H. L. BYRAM, County Tax Collector of Los Angeles County, and GEORGE T. GOGGIN, Trustee of Stockholders Publishing Company, Inc., a corporation, Bankrupt,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdiction for Review.

This appeal is by Jefferson Standard Life Insurance Company from an order of the District Court [R. 39] affirming an order of Referee in Bankruptcy David B. Head [R. 23] upon appellant's petition for review [R. 32]. Jurisdiction is conferred upon this court by Section 24 of the Bankruptcy Act, 11 U. S. C. A. 47. The amount involved is in excess of \$500.00.

Statement of the Case.

This appeal will give this court an opportunity to clarify the law on two important questions: the problem of so-called "circular priorities," and the problem of the allowance of post-bankruptcy interest on secured claims.

Petition in bankruptcy was filed December 31, 1954.

Real and personal property of the bankrupt was sold free and clear of liens for \$382,500.00 and sale confirmed on April 29, 1955, liens being transferred to the proceeds of sale with the acquiescence of all parties.

The liens ranked in the order of time as follows:

| <u>Claimant</u> | <u>Kind of Lien</u> | <u>Date Attached</u> | <u>Amount at Date of Bankruptcy</u> |
|-----------------------|--|----------------------|---|
| Jefferson Standard | Chattel mortgage trust deed and assignment. | December 1, 1945 | \$351,223.74 |
| United States | Corporate income and excess profits taxes and penalties on federal insurance contribution taxes. | March 14, 1952 | 288,608.58 |
| Los Angeles County | Real and personal property taxes. | March 1, 1954 | 15,384.10 |

Jefferson Standard's deed of trust was in default before bankruptcy, declaration of default having been filed on December 23, 1954 [R. 59-62].

It appears that the amount realized from the sale of the security was more than sufficient to pay Jefferson Standard's claim with interest to the date of payment, and in addition to pay the claim of Los Angeles County, although it is not sufficient to pay all lien claims in full.

Jefferson Standard's lien is first in time, and it is undisputed that it is entitled to priority over the federal tax lien, notice of the federal lien not having been recorded until December 20, 1954. The federal lien precedes the lien of Los Angeles County in point of time.

Recognizing the priority of Jefferson Standard's lien, the Referee ordered payment of its claim in the amount of \$351,223.74 (principal and interest to the date of bankruptcy), but ordered the deduction of \$15,384.10

to pay the tax claim of Los Angeles County, applying state law, which he thought made the County's lien superior to the mortgage lien. Jefferson Standard received payment of \$335,839.64 on September 1, 1955. The \$15,384.10 deducted to pay county taxes has been retained in the custody of the court. The order further provides that if anything is left after the lien of the United States has been fully satisfied, Jefferson Standard will then receive the balance of \$15,384.10 secured by its lien.

The result is that the lien of Los Angeles County (which is last in time) will be paid in full out of Jefferson Standard's money, and will be paid ahead of the prior mortgage lien and ahead of the federal tax lien. The federal tax lien will be paid before Jefferson Standard's lien is paid in full, in spite of the fact that the federal tax lien is clearly inferior to the mortgage lien under federal law.

Jefferson Standard contends that its antecedent mortgage lien is entitled to priority of payment over the County tax lien under state law as well as under federal law, but that in any event the Referee should have applied federal law and not state law to determine the priorities. Under federal law Jefferson Standard would be paid first, then the United States, and Los Angeles County last of all, under the rule "first in time, first in right."

The Referee also disallowed Jefferson Standard's claim to interest from the date of bankruptcy to the date of payment, this claim amounting to \$10,657.74. Jefferson Standard contends that since the proceeds from the sale of its security were more than sufficient to pay both principal and interest on its claim, interest should have been allowed up to the date of payment of the claim.

Specifications of Error.

Appellant specifies the following as error:

1. The Referee's orders erroneously and inequitably denied appellant's claim for interest after the date of filing of the petition in bankruptcy.

2. Said orders erroneously and inequitably subordinated payment of appellant's claim to the extent of \$15,384.10, not only to payment of the claim of the County of Los Angeles for real and personal property taxes but also to the claim of the United States for income and excess profit taxes and penalties on withholding and federal insurance contribution taxes.

3. Said orders erroneously and inequitably denied to appellant's lien priority over the liens of the County of Los Angeles and the United States.

4. Said orders erroneously and inequitably gave the lien of the United States priority over the lien of appellant to the extent of \$15,384.10.

5. Said orders erroneously and inequitably gave the lien of the County of Los Angeles priority over the lien of appellant.

6. The Referee committed error in applying state law to determine the priority of the liens of appellant and the County of Los Angeles.

7. The Referee committed error in determining that the law of California gave the lien of the County of Los Angeles for real and personal property taxes priority over the lien of appellant's mortgage and deed of trust.

8. Said orders erroneously gave the lien of the County of Los Angeles for real and personal property taxes priority over the lien of the United States for income and excess profits taxes and penalties on withholding and federal insurance contribution taxes.

ARGUMENT.

The first question presented by this appeal is that of the relative priority of federal tax liens, local tax liens, and a contract lien, where the contract lien is superior to the federal liens, and the fund is sufficient to pay the contract and local tax liens but not to pay all liens.

It is conceded that the lien of Jefferson Standard is superior to the federal lien.

The county contends that its lien is ahead of Jefferson Standard's, but Jefferson Standard contends that its lien is ahead of the county's.

Jefferson Standard contends that federal law controls the order of payment. The United States and the county contend that state law changes federal law.

If either of Jefferson Standard's contentions is sustained, it is entitled to be paid the funds deducted from its allowed claim and held for payment to the county.

We submit that the problem of "circular priorities" which has been supposed to arise in this situation is a problem which the Referee and the District Court in the case at bar and some other courts have created for themselves by ignoring applicable law. Certain cases illustrate an apparent judicial inclination to order local tax liens paid in full out of funds "set aside" for the payment of the contract lien, paying mere lip service to the acknowledged superiority of the contract lien under federal law. Those judges who have yielded to this impulse have usually justified the result by calling it the "most equitable" way out of their dilemma.

Actually, this solution is not equitable at all, and can only be justified as vindicating state sovereignty. Yet,

this is a case in which there is no room for the exercise of state sovereignty. This is so for two reasons. Federal law is supreme in bankruptcy administration. Federal law is also supreme wherever a federal tax lien is involved. Federal law accordingly should have been applied in this case.

Federal law, as declared in 1954 by the United States Supreme Court in *United States v. New Britain*, 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367, establishes the rule "first in time, first in right." This rule recognizes the superiority in equity of a senior lien over all other liens that are later in time, and is the universal rule in the absence of special statute.

"Circularity" arises only when controlling principles of law are ignored, or are not consistently applied. There can be no conflict between state law and applicable federal law, when federal law is the supreme law of the land. There can be no conflict between appellant's lien and a local tax lien, when the superiority of appellant's lien is established by supreme law. The Referee created the "conflict" of liens when, after he had recognized the superiority of appellant's lien under federal law, he then proceeded to ignore it and applied state law instead.

The Referee's order is erroneous and should be reversed because it ordered satisfaction of the local tax lien according to state law. His order is self-contradictory and directly contrary to federal law, as is illustrated by the fact that according to his order the federal lien will be fully satisfied before appellant gets the last \$15,384.10

of its money (if it ever does), although by federal law the government's lien is inferior to appellant's lien.

The Referee's order was based on his assumption that there was in fact a conflict between the liens of appellant, the County of Los Angeles, and the United States. A moment's reflection will show that this assumption was incorrect.

The Referee utterly failed to appreciate the significance of the fact that the fund was sufficient to pay both appellant's claim and the County's claim in full. There was no conflict between appellant's lien and the federal lien, because by federal law appellant's lien is admittedly superior to the federal lien. There was no conflict between appellant's lien and the county's lien, because the fund was ample to pay both. The Referee should have ordered appellant's lien paid in full. *Conflicting claims to the surplus* would then arise between the County and the United States. The surplus should have been ordered paid to the United States, whose claim is superior to the County's claim by reason of its priority in time and the supremacy of federal law.

Instead of so ordering, the Referee made the truly astonishing order that the County tax claim should be paid in full out of appellant's money, and that the claim of the United States should be paid in full before appellant's prior mortgage is fully satisfied!

There is no logical basis for such an order. It is apparent that the Referee used the fiction of a conflict between liens as justification for his failure to enforce the

superiority of the government's lien over the County's lien. There was, in fact, no such conflict. The real basis for the decision was the Referee's reluctance to deprive the County of Los Angeles of the flow of its "life blood" [R. 18].

As an additional ground for reversal of this part of the Referee's order, we further submit that by state law the County Tax Collector's lien is not paramount over appellant's lien, as the Referee erroneously assumed it to be. The California legislature could have passed a statute making state tax liens paramount over contract liens, as have the legislatures of other states, but it has never done so. The statutes and decisions on which the County Tax Collector relied relate solely to the effect of tax deeds, and are not relevant here where there has been and will be no tax deed, and the question is solely one of priority.

The second question presented by this appeal is that of the allowance of post-bankruptcy interest on a secured claim. Dicta of this court in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10, have been taken by district judges and referees in the Ninth Circuit as establishing a rule that post-bankruptcy interest may not be allowed on a secured claim, although the security is more than ample. We do not believe this result was intended by this court or is required by its decisions, and suggest that it take this opportunity to explain and reconcile its decisions and thereby bring the rule in the Ninth Circuit into line with the decisions of the Supreme Court and the great weight of authority in other circuits, which allow post-bankruptcy interest when the security is sufficient.

I.

Federal Law, Not State Law, Controls in Bankruptcy Administration and in Any Case Concerning a Federal Tax Lien.

Vanston Bondholders Protective Committee v. Green,
329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237 (1946):

“In determining what claims are allowable and how a debtor’s assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another state court. See *Holmberg v. Ambrecht*, 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582, 162 A. L. R. 719. But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles”

Michigan v. United States, 317 U. S. 338, 87 L. Ed. 312, 63 S. Ct. 302 (holding the federal estate tax lien superior to subsequent local tax liens):

“ . . . The establishment of a tax lien by Congress is an exercise of its constitutional power ‘to lay and collect taxes.’ Article 1, §8 of the Constitution. *United States v. Snyder*, 149 U. S. 210, 37 L. Ed. 705, 13 S. Ct. 846. And laws of Congress enacted pursuant to the Constitution are by Article 6 of the Constitution declared to be ‘the Supreme Law of the Land; and the Judges in every

State shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

" . . . Hence it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. *United States v. Snyder*, 149 U. S. 210, 37 L. Ed. 705, 13 S. Ct. 846, *supra*; *United States v. Greenville* (C. C. A. 4th), 118 F. 2d 963."

United States v. New Britain, 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367 (1954);

In re Freeze-in Manufacturing Corporation, 128 Fed. Supp. 259 (E. D. Mich. 1955).

The Bankruptcy Act contemplates a uniform system of priorities in distribution.

United States v. Sampsell, 153 F. 2d 731, 735 (9th Cir., 1946).

II.

The Federal Rule Is That the Lien That Is First in Time Is First in Right. Under This Rule Appellant's Lien Should Have Been Given Priority Over the Junior Liens of Appellees.

The applicable federal tax lien statutes are I. R. C., Sections 3670 and 3672.

I. R. C. 3670 (formerly R. S. 3186, now 26 U. S. C. A. 6321) makes federal taxes a lien on all property of the taxpayer. I. R. C. 3672 (now 26 U. S. C. A. 6323) makes the federal lien inferior to a mortgage lien which attached before recordation of the federal lien. These statutes read as follows:

I. R. C. 3670, 26 U. S. C. A. 6321:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”

I. R. C. 3672, 26 U. S. C. A. 6323:

“(a) Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate”

Applying I. R. C. 3670, the Supreme Court has held that it establishes the rule that the lien that is first in time is first in right.

United States v. New Britain, 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367 (1954), is very similar to the instant case, except that it was a mortgage foreclosure action, not a bankruptcy case. There were mortgage and judgment liens which came before unrecorded federal tax liens. Some of the federal tax liens came before local tax liens, others did not. The fund was insufficient to pay all lien claimants in full. State law purported to make the local tax liens paramount. The state court had ordered the local tax claims paid ahead of all other claims. The United States appealed. The Supreme Court reversed, holding that Congress by I. R. C. 3670 had intended to enact the universal equitable rule "first in time, first in right," and priority of payment should be determined according to the order of time. The opinion reads in part:

"Obviously, the State cannot on behalf of the City impair the standing of the federal liens, without the consent of Congress. *Michigan vs. United States*, 317 U. S. 338, 340, 87 L. ed. 312, 314, 63 S. Ct. 302; *United States vs. Oklahoma*, 261 U. S. 253, 260, 67 L. ed. 638, 644, 43 S. Ct. 295; *United States v. Snyder*, 149 U. S. 210, 214, 37 L. ed. 705, 706, 13 S. Ct. 846. On the other hand, the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States. The statute creating the federal liens here involved, I. R. C., §3670, does not in terms confer priority upon them.

* * * * *

"It does not follow, however, that the City's liens must receive priority as a whole. We believe that

priority of these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right.' As stated by Chief Justice Marshall in *Rankin v. Scott* (U. S.) *supra*:

“‘The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant.’ (12 Wheat., at 179.)

“This principal is widely accepted and applied, in the absence of legislation to the contrary. 33 Am. Jur. Liens, §33; 53 C. J. S., Liens §10b. *We think that Congress had this cardinal rule in mind when it enacted §3670, a schedule of priority not being set forth therein.* Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate.” (Emphasis added.)

The same rule applies in bankruptcy, where a uniform equitable system of distribution is contemplated.

In re Freeze-in Manufacturing Corporation, 128 Fed. Supp. 259 (E. D. Mich., 1955);

United States v. Sampsell, 153 F. 2d 731, 735 (9th Cir., 1946).

Cases relied on by the Referee [R. 18-20] and other cases reaching the same result¹ purport to apply both state and federal law, and justify the result as being the

¹Typically, *Southern Ohio Savings Bank v. Bolce*, 165 Ohio St. 201, 135 N. E. 2d 382 (1956).

“most equitable” under the circumstances. The result is not, however, consistent with federal law and cannot be supported by state law, which is powerless to override federal law. A reading of these decisions indicates that the motivating factor has been the concern of the judges to secure the revenues of their local governments, and that “equity” is invoked as a euphemism to disguise the fact that they are not applying state law, but rather are misapplying federal law.

Congress has made no enactment as part of the Bankruptcy Act specifying the order of priority for the payment of secured claims. Priority of secured claims should therefore be determined according to the order of their priority in time. This is the rule that the Supreme Court declared in the *New Britain* case, and it should be followed in the absence of special statute. Under no other rule can bankruptcy administration be uniform, equitable or predictable.

The order of priority of liens in bankruptcy should not be determined by the zeal of the individual referee or judge to see that local taxes are paid, or by the accident that the lien claims may or may not include a federal lien or a prior mortgage. For example, in a typical case where the federal tax lien equals or exceeds the funds available for distribution, local taxes clearly could not be paid unless there were also a prior mortgage superior to the federal lien. Why should the fact that there is a prior mortgage entitle the local tax lien to payment ahead of both the mortgage lien and the federal lien? Congress could not

have intended any such result. In the instant case, how can the existence of a local tax lien justify the subordination of appellant's lien to the federal lien, to which appellant's lien is superior? How can the existence of appellant's mortgage lien justify the full satisfaction of the local tax lien ahead of the federal lien to which it is inferior?

How can the Referee's order be called equitable when it directs payment of the local tax lien out of money set aside for the payment of appellant's prior mortgage? Does the sanctity of a citizen's contract rights mean nothing? Is that sanctity to be tossed aside in the interest of collecting local taxes? Suppose the proceeds of sale only equaled the local tax lien, and the contract lien also equaled the local tax lien. Is it equitable to wipe out a prior contract lien in favor of a junior tax lien?

The plain fact is that the rule contended for by appellees is not an equitable or even "the most equitable" solution, that it leads to confusion in administration and uncertainty of titles, and grossly impairs the security of lien creditors. Until such time as Congress chooses by appropriate legislation to confer an absolute priority on local tax liens, bankruptcy courts should apply the first in time, first in right rule according to federal law as construed by the Supreme Court. The Referee's failure to have done so in this case is judicial legislation.

III.

The Referee Should Have Abandoned the Property, Since Its Value Was Insufficient to Produce an Equity for General Creditors. The Order Appealed From Is Inequitable Because It Impairs Appellant's Security Without Any Benefit to the Bankrupt Estate.

It is a fundamental rule of bankruptcy administration that the priority right of a secured creditor in lien property should be protected and preserved unimpaired. Such right extends to the interest as well as to the principal of a secured claim. Title to the bankrupt's estate passes to the trustee subject to existing encumbrances. The trustee has no interest in lien property except to obtain an equity for unsecured creditors.

Case v. L. A. Lumber Products Co., 308 U. S. 106, 116, 84 L. Ed. 110, 120, 60 S. Ct. 1 (1939);

Consolidated Rock Products v. Du Bois, 312 U. S. 510, 527, 85 L. Ed. 982, 994, 61 S. Ct. 675 (1940);

Institutional Investors v. Chicago, Mil. etc. R. R. Co., 318 U. S. 523, 546, 87 L. Ed. 959, 997, 63 S. Ct. 727 (1942);

6 Remington *Bankruptcy*, sec. 2780;

6 Am. Jur. *Bankruptcy*, sec. 933.

The value of the property was more than sufficient to pay appellant's secured claim as to both principal and interest (\$361,881.48). The property was sold by the trustee free and clear of liens for \$382,500.00. The record shows that there was no hope of realizing a surplus for general creditors. The referee should have ordered the trustee to abandon the property, so as to permit appellant to proceed with foreclosure and recover the full

amount of the indebtedness secured by its trust deed. In a foreclosure action in the state court, appellant's prior mortgage lien would be ordered paid first, there being no conflict of liens because appellant's lien is superior to the federal lien and the surplus, after payment of appellant's lien, would be sufficient to pay the County tax lien. Conflicting claims that might then arise to the surplus would be the proper subject of litigation between the County and the United States, and would not concern appellant.

The order appealed from is inequitable in the extreme, not only because it substantially impairs appellant's security without any benefit to the bankrupt estate, but because it results in using appellant's property to pay the bankrupt's taxes owed the United States and Los Angeles County. This result is contrary to every principle of equity and constitutional law. What we are saying has been clearly stated by the California Supreme Court in *National Ice Co. v. Pacific Fruit Express*, 11 Cal. 2d 283, 291:

“As a legal deduction, it has been judicially declared that a tax constitutes a debt owed by the person upon whom such tax has been legally imposed; and aside from equitable considerations (which here are not involved), to baldly legislate that without, and in the absence of either due or any process of law, a legal debt that is owed by one person must be paid by another, is quite at variance with ordinary notions of that which may be termed the administration of justice.”

IV.

Appellant's Lien Is Entitled to Priority Over the County's Tax Lien Under California Law.

Under the controlling California statute, Civil Code, sec. 2897, appellant's lien is entitled to priority over the county tax lien, which attached almost 10 years after appellant's trust deed was recorded. This section reads:

"Priority of liens. Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and *respondentia*."

It has long been settled in California that tax liens are not entitled to priority over pre-existing contract liens unless they are given such priority by statute.

Guinn v. McReynolds, 177 Cal. 230, 170 Pac. 421 (1918):

"The general rule for fixing the relative rank of liens is declared by section 2897 of the Civil Code, which declares that 'other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and *respondentia*.' This rule will govern unless, in any given case, the statute prescribes otherwise."

H. O. L. C. v. Hansen, 38 Cal. App. 2d 748, 102 P. 2d 417 (1940):

"The decisions in both the Guinn and Bolton cases dispel any doubt as to whether California follows the rule of law that tax liens are *ex proprio vigore* superior to a pre-existing mortgage or other contract liens. These cases definitely hold that a para-

mount lien for unpaid taxes depends solely upon legislative enactment.”

Fresno County v. Commodity Credit Corporation, 112 F. 2d 639 (9th Cir. 1940):

“ . . . Whatever may have been said concerning the ‘superior dignity’ principle in earlier cases on liens on real property is overruled by the holding in *Guinn v. McReynolds*, 177 Cal. 230, 232, 170 P. 421, 422, where a real estate mortgage lien was held superior to a subsequently created tax lien on the same property, not expressly made a first lien, for expenditures for eradication of disease and pests in orchards and elsewhere.”

Although many other states have such statutes, there is no statute in California purporting to make the lien for county taxes paramount or giving it priority over pre-existing contract liens. The California statutes are restricted to declaring the effect of *tax deeds*. Since no tax deed is involved in this case, those statutes are irrelevant. The question here is one of priority. It is immaterial that foreclosure would not wipe out the county tax lien, since the bankruptcy court’s order legally cancelled the lien.

The Referee’s order should be reversed because appellant’s lien is entitled to priority under the only California statute dealing with priorities.

V.

**State Law Should Have Been Disregarded Since It
Would Be Inequitable to Give the County Tax
Lien Priority Over Appellant's Lien.**

Any state statute giving a tax lien priority over a pre-existing contract lien is an act of a sovereign exercising superior force. It cannot be justified on any equitable principle. If California law is what the Referee erroneously found it to be, he should have disregarded California law.

It is well settled that a state statute that is inconsistent with the principles of equity may be disregarded by a bankruptcy court.

U. S. Trust Co. v. Zelle, 191 F. 2d 822 (8th Cir. 1951);

Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237 (1946).

VI.

Interest Should Have Been Allowed on Appellant's Claim to the Date of Payment, Since the Security Was Sufficient to Pay Both Principal and Interest.

In *United States v. Sampsell*, 153 F. 2d 731 (1946), this court held that interest should be allowed from the date of bankruptcy to the date of payment of a secured claim, where the security was sufficient to pay both principal and interest. The rule so established for the Ninth Circuit was in accordance with the decision of the Supreme Court in *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 29 S. Ct. 436 (1908).

In 1946 the Supreme Court decided *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237, holding that, although the security was sufficient, interest on unpaid interest should not have been allowed after the date of bankruptcy on equitable principles, since interest on unpaid interest was in the nature of a penalty for late payment, and payment of simple interest had been deferred by order of court. It is to be noted that in this case *simple interest was allowed to the date of payment of the secured claim*, and the Supreme Court did not purport to depart from the rule that the allowance of such interest was proper.

In *Pacific States Corporation v. Hall*, 166 F. 2d 668 (1948), this court affirmed an order denying interest on a secured claim after the date of bankruptcy, because the record afforded no basis for a determination that such denial was improper. The *Vanston* case was cited as

supporting the proposition that interest might be allowed where the security was sufficient:

“Appellant insists, however, that equitable principles may be invoked to award interest to a secured creditor subsequent to the filing of a petition in bankruptcy where the value of the security is in excess of the principal and interest due, and where such award will not be unfair to subordinate creditors. *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156, 167 S. Ct. 237. From the record before us, the value of the security and the relative equities between the secured creditor and the subordinate creditors cannot be determined.”

In *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (1951), this court was presented with a case in which it would have been inequitable to have allowed interest after the date of bankruptcy. *It does not appear from the report that the value of the security was sufficient to cover both principal and interest.* The estate had been in the courts for years; the report suggests that the creditor may have been obstructive and responsible for some of the delay in the payment of its claim, as well as that a high rate of interest had been secured by taking advantage of the debtor's financial embarrassment prior to bankruptcy. Interest after the date of bankruptcy was properly denied except from the income from the security or any surplus remaining after all other claims were paid. On the record before the court the decision was undoubtedly correct and was in accordance with precedent. However, in a footnote (192 F. 2d at 14) the court remarked by way of dictum that its decision in *United States v. Sampsell* had been necessarily overruled by *Vanston*.

Courts in other circuits have been practically unanimous in holding that the *Vanston* decision did not change

the rule that where the security is sufficient interest should be allowed after bankruptcy, unless the record shows that such allowance would be inequitable.

U. S. Trust Company v. Zelle, 191 F. 2d 822 (8 Cir. 1951);

In re Macomb Trailer Coach, 200 F. 2d 611 (6 Cir. 1952);

Georgia, Florida & Alabama R. Co. v. Bankers Trust Co., 170 F. 2d 733 (5 Cir. 1948);

Oppenheimer v. Oldham, 178 F. 2d 386 (5 Cir. 1949);

Littleton v. Kincaid, 179 F. 2d 848 (4 Cir. 1950);

In re Riddlesburg Mining Co., 224 F. 2d 834, 839 (3 Cir. 1955);

Eddy v. Prudence Bonds Corporation, 165 F. 2d 157 (2 Cir. 1947);

In re Worden, 107 Fed. Supp. 496 (W. D. Ky. 1952);

In re Tele-tone Radio Corporation, 133 Fed. Supp. 739, 749 (D. C. N. J. 1955);

In re International Hydro-Electric System, 101 Fed. Supp. 222 (D. C. Mass. 1951).

It will have been noted that the actual decisions of this court in *Sampsell*, *Pacific States* and *Beecher* (as opposed to its unfortunate dictum in *Beecher*) are consistent with the rule of the *Vanston* case as construed in other circuits. Yet we understand that referees and District Judges in the Ninth Circuit have felt constrained, as did the Referee in the instant case [R. 22], to follow the footnote and to disallow post-bankruptcy interest, even when the record shows that the security is sufficient.

The question is, what does the footnote mean? We submit that all this court intended to convey by the footnote was that *Sampsell* was no longer the law in this circuit to the extent that it had held that post-bankruptcy interest must be allowed in all circumstances where the security was sufficient, even when on the record such allowance would be inequitable. It is not to be supposed that this court could, by mere dictum, have intended to establish a rule contrary to its own previous decisions and contrary to the rule of the Supreme Court as construed in all other circuits.

In the instant case, the Referee's order finds no support in the record. There is a total absence of those features which compelled the disallowance of post-bankruptcy interest in the *Beecher* case. Here, the record affirmatively shows that the proceeds of the sale of the security were more than sufficient to pay principal and interest on appellant's claim. The Referee found as a fact that appellant did nothing to delay payment of its claim and cooperated at all times in the administration of the estate [R. 24-25]. Appellant's trust deed was executed 9 years before the debtor went into bankruptcy. The record is devoid of any suggestion that the rate of interest is extortionate or that any advantage was taken of the debtor during an interval of financial embarrassment prior to bankruptcy, as in the *Beecher* case. The Referee's order is of no possible benefit to general creditors, but is simply a windfall to the United States, whose lien is clearly subordinate to appellant's lien by statute.

There being no equitable reason whatsoever for disallowing interest on appellant's claim from the date of bankruptcy to the date of payment, the Referee's order should be reversed.

Conclusion.

The order appealed from is inequitable because it appropriates appellant's money for the payment of the county tax lien, and impairs appellant's security without any benefit to the bankrupt estate. It is erroneous because it ignores controlling federal law to give the county tax lien priority of payment over the superior liens of appellant and the United States, and subordinates appellant's lien to the lien of the United States. It subordinates appellant's prior mortgage lien to the county tax lien, although appellant's lien is entitled to priority by California law as well as by federal law. Affirmance will lead to confusion and uncertainty in bankruptcy administration, and will give the lien for county taxes an absolute priority to which it is not entitled by any statute. The order can only be justified as a vindication of state sovereignty; that is no proper function of a bankruptcy court unless and until Congress has made it such.

The order is also erroneous in denying appellant interest on the principal amount of its claim to the date of payment, the proceeds of the sale of the security being sufficient and there being no equitable reason for disallowing interest.

The order should be reversed, with directions to pay appellant's claim in full, including the balance of \$15,-384.10 withheld and \$10,657.74 interest to the date of payment.

Respectfully submitted,

MESERVE, MUMPER & HUGHES,
and

LEO E. ANDERSON,

*Attorneys for Jefferson Standard Life
Insurance Company, a corporation,
Appellant.*

No. 15349

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON STANDARD LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, H. L. BYRAM, County Tax Collector of Los Angeles County, and GEORGE T. GOGGIN, Trustee of Stockholders Publishing Company, Inc., a corporation, bankrupt,

Appellees.

Reply Brief of George T. Goggin, Trustee of Stockholders Publishing Company, Inc., a Corporation, Bankrupt.

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Appellees.

Reply Brief of George T. Goggin, Trustee of Stockholders Publishing Company, Inc., a Corporation, Bankrupt.

Appellant's Opening Brief points out the two important questions presented on this appeal:

1. The problem of so-called "circular priorities";
2. The problem of allowance of post bankruptcy interest on secured claims.

We will attempt to give support herein to the first point mentioned hereinabove and George T. Goggin, trustee, respectfully contends that the Order of Referee David B. Head which fixed the manner of distribution of the sales

proceeds funds to the secured creditor Jefferson Standard Life Insurance Company, to the United States of America and to H. L. Byram, County Tax Collector of Los Angeles County, was correct. The said Order (and Supplemental Order) was affirmed on review by United States District Judge William M. Byrne and is here on appeal by Jefferson Standard Life Insurance Company.

We do not mean to imply that the interest controversy is not important. On the contrary, we believe it is by far the most important matter that bankruptcy administration in this District has been confronted with in the past ten years. However, it would appear that prior to the time of the hearing on the within appeal, the particular issue of post bankruptcy interest on secured claims will have been already determined by this Honorable Court in the appeal No. 15105 of Palo Alto Mutual Savings and Loan Association, Appellant, v. Ralph E. Williams, trustee of the estate of John E. Driskin, Bankrupt. The said appeal having been originally presented with oral argument and taken under submission; thereafter the submission having been set aside and the reargument has been reset before the court in banc.

We believe it is reasonable for us to assume that this Court will therein determine whether or not the law as established by this Court in 1946 in the case of *United States v. Sampsell*, 153 F. 2d 731, which allowed interest to date of payment (where the proceeds of security were ample for that purpose) and not to date of bankruptcy, was overruled by reason of the determination of the United States Supreme Court in its case of *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156, 91 L. Ed. 162, 67 S. Ct. 237.

This Court in the case of *Beecher v. Leavenworth State Bank* (1951), 192 F. 2d 10, stated at page 14, note 4:

“Our decision in *United States v. Sampsell*, 9 Cir., 153 F. 2d 731, allowing post-bankruptcy interest on a secured claim where the proceeds of the security were ample for that purpose was necessarily overruled by the Supreme Court in the *Vanston* case which followed the *Sampsell* case.”

We therefore reserve herein our comments on the interest point involved and reserve in our oral argument herein the presentation of our views thereon which will be in accordance with the Court's determination in the *Palo Alto* case.

The Problem of Circular Priorities.

The Referees held that in point of time the liens rank as follows [Memorandum of Referee dated January 6, 1956, Tr. p. 17]:

“First, Jefferson; second, the United States; and third, the County of Los Angeles. The lien of the United States attached upon the receipt by the Collector of the assessment list on March 14, 1952, Sec. 3671, Internal Revenue Code of 1939. The lien of the United States is junior to the lien of Jefferson by reason of the provision of Section 3672, I. R. C., which excepts the lien of a mortgagee from the paramount lien of the United States. The lien of the County of Los Angeles is effective as of the date of March 1, 1954. This lien is junior to the lien of the United States because relative priorities are governed by the rule of ‘first in time, first in right.’ *United States v. City of New Britain, et al.*, 347 U. S. 81; *California State Department of Employment v. United States* (C. A. 9), 210 F. 2d 242. However, the lien of the County of Los Angeles, by

California law, is superior to the lien of Jefferson. *Dougherty v. Henarie*, 47 Cal. 9; *Courtney v. Byram*, 54 Cal. App. 2d 769. . . . This court is faced with the anomalous situation where Jefferson's mortgage lien has priority over the tax lien of the United States, and the tax lien of the County supersedes the mortgage lien and the fund is insufficient to satisfy the claims of all three parties. . . ."

The appellant contends (on p. 7 of its Br.):

"that the fund was sufficient to pay both appellant's claim and the County's claim in full. There was no conflict between appellant's lien is admittedly superior to the federal lien. There was no conflict between appellant's lien and the county's lien, because the fund was ample to pay both. The Referee should have ordered appellant's lien paid in full. *Conflicting claims to the surplus* would then arise between the County and the United States. The surplus should have been ordered paid to the United States, whose claim is superior to the County's claim by reason of its priority in time and the supremacy of federal law."

In point of time obviously the Jefferson encumbrances of 1945 were prior to the County of Los Angeles tax lien for 1954-1955 property taxes. However, the California cases relied upon by the Referee of *Dougherty v. Henarie*, 47 Cal. 9, and *Courtney v. Byram*, 54 Cal. App. 2d 769, we believe, fully support his Order that the tax lien is "superior" to the Jefferson lien. Quoting from the latter case at page 770:

"By statutory provision and by the harsh law of necessity, taxes are a first lien upon property, and the obligation to pay taxes is superior to the obligation of private debts."

Superiority of County Tax Lien Over Contract Liens.

The County tax lien does not lose its superiority over private contract liens such as Jefferson's merely because the latter are prior to a federal tax lien.

It appears that the amount realized from the sale of the security was more than sufficient to pay Jefferson Standard's claim with interest to the date of payment, although it is not sufficient to pay all lien claims in full.

Jefferson Standard's lien is first in time, and it is undisputed that it is entitled to priority over the federal tax lien, notice of the federal lien not having been recorded until December 20, 1954. The federal lien precedes the lien of Los Angeles County in point of time.

Recognizing the priority of Jefferson Standard's lien, the Referee ordered payment of its claim in the amount of \$351,223.74 (principal and interest to the date of bankruptcy).

Superiority of Liens of United States Over County Tax Liens.

In *United States v. City of New Britain*, 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367 (1954), the proceeds were not sufficient to pay all claims in full and although it was not shown that the corporation was insolvent, the Supreme Court held that the federal tax liens which arose in 1948 and 1950 were prior to the real estate tax liens which became due in 1947 through 1951 and "water rent liens" from 1947 to June, 1951. From the opinion at pages 86 and 87:

"In the instant case, certain of the City's tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens.

The State and the United States were both holders of general statutory liens in the Gilbert Associates case, *United States v. Gilbert Associates, Inc.*, 345 U. S. 361, 97 L. Ed. 1071, 73 S. Ct. 701. But the question we have here did not arise there because that was a case involving personal property and insolvency of the taxpayer. We said in that case:

‘Where the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, Section 3466 (Revised Statutes) clearly awards priority to the United States.’ 345 U. S., at 366.

Here the contest is between two groups of statutory liens, one specific and one general, attached to the same real estate, with no question of insolvency involved; therefore, ‘the first in time is the first in right.’

The State finds the rule of ‘first in time, first in right’ not applicable because of Section 3672 of the Internal Revenue Code, which makes the lien of the United States invalid as to the prior recorded mortgages and the judgment in this case. It points out that the mortgagee could have paid the delinquent real-estate taxes and water rent, with the amount so paid becoming part of the mortgage debt covered by the mortgage lien, and suggests that the federal tax lien would therefore be invalid as to such amount by virtue of Section 3672. From this and a belief that Congress did not intend, by giving mortgages and judgments priority over federal tax liens, to supersede state laws making certain interests superior to mortgages and judgments, the Supreme Court of Errors concluded that by enacting Section 3672 Congress ‘expressed the intention that federal liens should be subordinated to such mortgages and judgment liens as are described therein and, consequently, subordi-

nated to such other incumbrances as have priority over those mortgages and judgment liens.

We do not agree. The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. . . .”

In the case of *Smith v. United States*, 113 Fed. Supp. 702 (1953), the United States District Court, District of Hawaii, had before it the following situation, quite similar to the problem here presented (from the opinion at pp. 710 and 711):

“This Court is thus faced with the anomalous situation where Smith’s mortgage lien has priority over most of the United States’s tax liens, the bulk of the Territory’s tax liens supersedes the mortgage lien and some of the United States’s tax liens are prior to the Territory’s liens, and where the escrow fund is insufficient to satisfy the claims of all three parties. Although cases in point are meager, the few cases in existence are helpful as judicial guideposts.

In *Ferris v. Chic-Mint Gum Co.*, 1924, 14 Del. Ch. 232, 124 A. 577, 580, under Delaware law, the state, county and city tax and sewer liens were given priority over the mortgage lien; the mortgage was recorded prior to the attachment of federal tax liens; and some of the federal tax liens antedated some of the state, county and city tax and sewer liens. The Delaware court resolved the problem by setting the following order of priority: first, state, county and city tax and sewer liens; second, mortgage lien; and third, United States tax liens. . . .

The highest court of Connecticut similarly resolved a tripartite priority problem in *Brown v. General Laundry Service, Inc.*, 1952, 139 Conn. 363, 94 A. 2d 10. It reasoned that Congress, by subordinating federal tax liens to mortgage and judgment liens in 26 U. S. C., Section 3672, subordinated such federal liens to such other incumbrances having priority over those mortgage and judgment liens.

The first inkling as to another method of resolving the tripartite priority problem here involved appeared in *Spokane County v. United States*, 1929, 279 U. S. 80, 49 S. Ct. 321, 73 L. ed. 621. Although a third party mortgagee was not involved, Chief Justice Taft referred to the contention made by the United States in the *Spokane County* case and stated 279 U. S. at page 91, 49 S. Ct. at page 324:

‘Moreover it is contended by the government that the relative priorities could have been maintained in that case (*Chic-Mint Gum Co. case*) by setting apart sufficient funds to pay the mortgage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart.’

After citing Chief Justice Taft’s dicta, a circuit court of West Virginia adopted the solution suggested in the *Spokane County* case. In *Hopkins v. Eureka Coal Co.*, 1944, 33 Am. Fed. Tax Rep. 1627, the court ruled that the order of priority was first, mortgage liens; second, United States tax liens; and third, West Virginia tax liens. However, the amounts due the mortgagees were ordered set apart to permit West Virginia to first satisfy its liens from such amounts.

. . .

This court feels that the resoult reached in the *Eureka Coal* case is the fairest. The *Eureka Coal* solution maintains the relative priorities established by the local and federal statutes, where as the *Chic-*

Mint Gum rule arbitrarily ignores the principle of 'first in time, first in right' which should apply to the general liens of the local and federal governments.

. . . .”

Applying the rule of the *Eureka* case the Court thereupon ordered paid: 1. the United States lien which was prior in point of time; 2. the payment of the mortgage obligation; 3. various United States liens which were subsequent to the mortgage. *And, from the fund set aside for the mortgage that the tax claim of the Territory be paid.*

The United States admits that the mortgage lien is prior to its liens. Therefor the Order as here on appeal takes nothing from it so long as the disbursement prior to its participation is the equivalent of the Jefferson obligation. The County Tax Collector is receiving payment of his tax lien in the manner indicated from the Order. His argument and contentions that he should receive payment before the prior United States tax liens have never seemed to us to carry much weight or have any legal support. If he is not paid in the manner as provided in the Order, we see no theory upon which he can be paid from the fund derived from the sale of the security, if he cannot receive payment from any portion of the fund remaining over the mortgage payment which most certainly is claimed by the Director of Internal Revenue.

However, Jefferson Standard asserts that it is prior in all respects to the United States and that the rule of distribution should work in its favor and not in favor of

the position of the United States. In other words, while it does not concede that the County Property tax is ahead of its lien, it takes the position that if the County is to be paid, the payment should be made from the funds over and beyond the payment of its lien and in effect out of the amount allocated to the United States.

This Court in 1953 decided the case of *United States v. Division of Labor Law Enforcement*, 201 F. 2d 857, and while the case is upon a different state of facts, we nevertheless believe it has application herein as much as it determined a matter of distribution and priority.

The facts in this case are comparatively simple. A General Assignment for Benefit of Creditors was made by a debtor. Labor claimants asserted their lien claims which arose at the instant of the Assignment against the assets under California Code of Civil Procedure, Section 1204. The United States asserted tax claims for priority of payment under 31 U. S. C. A., Section 191, at the same instant and we believe that the following syllabus of the reported case reflects the views set forth therein:

“A state statute purporting to create a lien at the very instant federal priority arises is incompatible with the federal statute establishing the priority, and where such conflict exists, the supremacy of the federal law must be recognized. 31 U. S. C. A., Section 191; U. S. C. A. Const. art. 6, cl. 2.”

Following the expression as set forth herein, the trustee respectfully expresses the view that: 1. there is no manner or method of law by which one cent can be taken from the fund of the United States (*i.e.*, the residue

after a payment of the equivalent of the Jefferson Standard Lien) to pay the County Tax which lien is junior; 2. that the County Tax must be paid before the mortgage obligation is paid; 3. that the Order of the Referee and United States District Judge be affirmed.

Respectfully submitted,

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ANDREW F. LEONI,

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In the
United States Court of Appeals
For the Ninth Circuit

JEFFERSON STANDARD LIFE IN-
SURANCE COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, H.
L. BYRAM, County Tax Collector of
Los Angeles County, and GEORGE T.
GOGGIN, Trustee of Stockholders
Publishing Company, Inc., a corpora-
tion, bankrupt,
Appellees.

Brief of Appellee, H. L. Byram, County
Tax Collector of the County of
Los Angeles

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bankrupt,

Appellees.

No. 15349

Brief of Appellee, H. L. Byram, County
Tax Collector of the County of
Los Angeles

INTRODUCTION

This case involves the "circular priority" of liens, which necessarily includes a study of the liens making up the circle, that is, the priority of a county tax lien over a private mortgage lien and the priority of tax liens of the United States. The question of post-bankruptcy interest on secured obligations of the bankrupt is also raised.

By "circular priority" of liens we mean simply this: There are three lien claimants entitled to share in a fund not large enough to pay them all, each of the three being prior to the next one until the circle is completed. The lien of the County Tax Collector is ahead of that of the Mortgagee-Appellant, which is ahead of the lien of the United States, which in its turn claims priority over the County's tax claim.

The Bankruptcy Court ordered the sale of certain real and personal property free and clear of all liens, the liens being transferred to the fund produced from the sale. But the resulting fund is not large enough to pay all such lien claimants in full. The County Tax Collector maintains that his claim is prior to all private liens regardless of date. The holder of the trust deed and chattel mortgage (Appellant, Jefferson Standard Life Insurance Company) is conceded to be ahead of the tax claim of the United States (being a "mortgagee" within the meaning of Section 3672, I.R.C., now 26 U.S.C. Sec. 6323) and also prior in point of time to the United States' liens.

Appellant, Jefferson Standard, the mortgagee, does not concede that it is junior to the County's tax lien, and the County only with hesitation and some reservations and exceptions admits that it may be junior to the Federal tax liens. However, all parties agree that interest should be allowed on the secured claims up to the date of payment, not merely to the date of bankruptcy.

The Referee, the Honorable David B. Head, solved the problem of circular liens by ordering the lien of Jefferson Standard paid in full (except for interest), and the balance of the fund paid to the United States. Then he ordered the Appellant to pay the prior lien claim of the County Tax Collector out of the fund thus set aside for Appellant, Jefferson Standard, the mortgagee with appropriate provisions in case additional funds should be discovered. This Appellee submits that this solution is the fairest and most equitable that has been suggested and is fully supported by Federal and state law. The United States District Court affirmed this action, Honorable William M. Byrne, District Judge (Tr., pp. 39-40).

ARGUMENT

I.

**THE LIEN OF THE COUNTY OF LOS ANGELES
FOR REAL AND SECURED PERSONAL PROP-
ERTY TAXES IS PRIOR TO ALL PRIVATE
LIENS REGARDLESS OF WHEN THE PRI-
VATE LIEN ATTACHES.**

The County's tax lien is therefore superior to and entitled to priority over the lien of the trust deed and chattel mortgage of Appellant, Jefferson Standard Life Insurance Company.

Dougherty v. Henarie (1873), 47 Cal. 9, 14;
People v. Central Pacific R. R. Co. (1890), 83
Cal. 393;
Courtney v. Byram (1942), 54 Cal. App. 2d
769, 772;
California Constitution, Article XIII, Sec-
tion 1.

In *Courtney v. Byram*, 54 Cal. App. 2d 769 at 772, the court said:

“By statutory provision, as indeed by the harsh law of necessity, taxes have been made a first lien upon property. They are a primary obligation of the citizen, and the flow of this ‘life blood of government’ may not be interrupted. Generally, therefore, the obligation to pay taxes is superior to the obligation of private debts.”

The County's lien is for the general property tax, secured by lien on specific real estate, the backbone

of the financial structure of local government. The many cases arising from street bond foreclosures, special assessments and general liens, now on a parity with each other, are confusing. (*Monheit v. Cigna*, 28 Cal. 2d 19, 27, 168 P. 2d 965.) Section 3900 of the Revenue and Taxation Code places these liens on a parity. But no reference is made to private liens, such as the mortgage of Jefferson Standard. We submit that the status of private mortgage liens has been so well established that it has not been thought necessary to make specific reference to them.

Even in the absence of any statute, general tax liens prevail over special assessments and private liens.

In *La Mesa etc. Irrigation Dist. v. Hornbeck* (1932), 216 Cal. 730 at 735, 17 P. 2d 143, the court said:

“First, it is well settled that in the absence of a statutory or constitutional provision a distinct priority exists in favor of general taxes over special assessments of every kind. (*Dougherty v. Henarie*, 47 Cal. 9; 26 R.C.L., p. 404, sec. 361; *State v. Board of Commrs.*, 89 Mont. 37 [296 Pac. 1].) The reason for this rule is well stated in *Robinson v. Hanson*, 75 Utah, 30 [282 Pac. 782, 784], as follows: ‘We are not dealing with claims of intrinsic equality. The claim for the necessary support of government is a higher obligation than the demand for the costs of a local improvement, even though the latter has *quasi* public features. The first and paramount necessity for social order, personal liberty, and private property is the maintenance of civil government; and government can-

not exist without revenues. The necessity and importance of preferring the lien for general taxes over other claims are so impelling that the priority of the sovereign claims of the state will not be depreciated or denied without warrant from the legislature in clear and unmistakable terms; and we find no such warrant from the legislature. The provisions of the statute upon the subject are not inconsistent with the priority of the right of the state to its necessary revenues.' "

The lien of the County Tax Collector is for the usual annual general property tax which becomes a lien on the first Monday in March for the ensuing fiscal year. It includes general and special taxes of all taxing agencies who have their taxes assessed and collected by County officers. (*Knox-Powell-Stockton Co.*, [1939, C. A., 9th], 100 F. 2d 999.) All property owners and investors are familiar with it; it is usually taken care of in escrow, often without changing the purchase price. Jefferson Standard could have checked the record or subscribed to a tax service that would. It could then have seen that its mortgagor paid the tax when it became due November 1, 1954, or at least before delinquency, December 10, 1954, either date being prior to bankruptcy herein. The County's tax lien is for \$15,384.10 or about two and a half per cent of the total liens claimed by Jefferson Standard and the United States (Tr., pp. 28 and 29).

II.

**THE PROBLEM OF CIRCULAR PRIORITIES WAS
CORRECTLY SOLVED BY THE REFEREE
HEREIN.**

The County Tax Collector claims a lien superior and prior in right to the trust deed and chattel mortgage of Jefferson Standard. It is conceded that Jefferson Standard's lien is entitled to priority over that of the United States of America. The United States claims its liens are entitled to priority over the County's tax lien. The circle could continue indefinitely, each claimant being entitled to priority over the next. This the Referee solved by ordering payment in full (except interest) to Jefferson Standard, the balance of the fund being paid over to the United States, which gives the United States all it could legitimately hope to receive under the circumstances. Then the Referee ordered the payment of the County tax claim by Jefferson Standard out of its portion of the award. This in turn gives Jefferson Standard all that it could legitimately expect to receive, that is, its claims in full, less what is clearly its obligation, that is, payment of the County's tax claim.

This or a substantially similar plan was approved in the following cases:

Smith v. United States (July 28, 1953), Dist. Ct., Hawaii), 113 F. Supp. 702, 711-712;

Southern Ohio Sav. Bank v. Bolce (May 9, 1956), 165 Ohio St. 201, 135 N.E. 2d 382,

390-391; same case (January 24, 1955) 125 N.E. 2d 217;

Hopkins v. Eureka Coal Co. (1944), 33 Am. Fed. Tax Rep. 1627;

Ferris v. Chic-Mint Gum Co., 14 Del. Ch. 232, 124 A. 577;

Brown v. General Laundry Service (December 30, 1952), 139 Conn. 363, 94 A. 2d 10 (vacated by *U. S. v. City of New Britain* (February 1, 1954), 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367). Same case, April 4, 1955, Superior Court, 19 Conn. Sup. 335, 113 A. 2d 601, 603-605.

In the *Smith* case, *supra*, there were long lists of Federal and Territorial liens, a "trust chattel mortgage" for the benefit of creditors and miscellaneous other liens. The court ordered the prior United States liens paid first, the balance of the fund to be paid on the mortgage, but the Territorial liens to be paid out of funds set aside for the mortgage.

In the *Southern Ohio Savings Bank* case, *supra*, 135 N.E. 2d 382, 390-391, the court made a similar distribution, saying:

"Recognizing, however, the position which the federal Supreme Court has taken on the issues involved from the expressions of the court above quoted from the New Britain case and other cases, we are obliged to recognize the federal tax liens as having priority over local and state tax liens, as found by the Court of Appeals.

“The problem of the distribution of the funds in the instant causes remains to be considered. It is conceded that the mortgages and judgments are superior to the federal tax liens; that the federal tax liens are by this decision found to be superior to the local or state tax liens; and that the local or state tax liens are superior to the mortgage and judgment liens.

“In this revolving circle, some courts have preferred the mortgage, and with it the local tax lien, over the federal lien which is remitted to any proceeds of sale remaining. See *Ferris v. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 A. 577; *Brown v. General Laundry Services, Inc.*, 53-1 U.S.T.C., paragraph 9272.

“But this plan of distribution fails to give the federal tax lien the priority of distribution to which, under the federal authorities, it is entitled. Another scheme of distribution, which was substantially adopted by the Court of Appeals in the instant causes, and which has sanction under some authorities as the best possible solution under the circumstances, calls for a setting aside of a fund equal to the total amount due to the mortgagees and judgment creditors under their liens which by federal statute have priority over the federal tax lien.

“This court is of the opinion that where, in a judicial sale of land incumbered by a state tax lien, a federal tax lien and other creditor liens, which latter liens are preferred by federal statute over the federal tax lien, the proceeds of the sale are insufficient to pay all such lien incumbrances

in full, there shall be set aside from the proceeds of the sale a fund equal to the amount of the creditor liens so preferred over the federal tax lien to the extent that the proceeds of sale are sufficient, out of which fund the state taxes shall first be paid, and the remainder of such fund shall be paid to creditor lienholders, whose lien are so preferred over the federal tax lien, according to their lien priority, and the remainder of the proceeds of sale, if any, shall be paid to the United States on its tax lien."

We submit that the Referee's decision herein is fair and equitable, as well as legally correct.

CONCLUSION

The lien of the County of Los Angeles for real and secured personal property taxes is entitled to priority over any private lien claim, including that of the Jefferson Standard Life Insurance Company. The lien of Jefferson Standard is admittedly prior to that of the United States, which in turn is alleged to be prior to the County's lien. The Referee properly solved the circular priority, which was ordered affirmed by the District Court, and should be affirmed by this Honorable Court, with costs to Appellee.

Respectfully submitted,

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No. 15349

**In the United States Court of Appeals
for the Ninth Circuit**

JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, H. L. BYRAM, COUNTY TAX COLLECTOR OF LOS ANGELES COUNTY, AND GEORGE T. GOGGIN, TRUSTEE OF STOCKHOLDERS PUBLISHING COMPANY, INC., A CORPORATION, BANKRUPT, APPELLEES

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

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In the United States Court of Appeals for the Ninth Circuit

No. 15349

JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, H. L. BYRAM, COUNTY TAX COLLECTOR OF LOS ANGELES COUNTY, AND GEORGE T. GOGGIN, TRUSTEE OF STOCKHOLDERS PUBLISHING COMPANY, INC., A CORPORATION, BANKRUPT, APPELLEES

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

OPINION BELOW

The order of the District Court affirming the order of the referee in bankruptcy (R. 39-41) is not officially reported.

JURISDICTION

This appeal involves the relative superiority of a secured claim of Jefferson Standard Life Insurance Company, the appellant herein, and of tax liens of the United States and those of the County of Los Angeles, upon property of Stockholders Publishing Company, the bankrupt herein. The District Court had juris-

diction under Section 2 of the Bankruptcy Act to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto. Pursuant to Section 39 of the Bankruptcy Act, the referee in bankruptcy issued his findings of fact, conclusions of law and order for payment on February 20, 1956. (R. 23-32.) Under Section 39 (c) of the Bankruptcy Act, Jefferson Standard Life Insurance Company filed with the referee, on March 15, 1956, a petition for review of such order by the District Court. (R. 32-35.) An order of the District Court was entered on July 20, 1956, affirming the order of the referee. (R. 37-38.) A formal order affirming the order of the referee was entered by the District Court on August 14, 1956. (R. 39-41.) Under Section 25 of the Bankruptcy Act, Jefferson Standard Life Insurance Company filed its notice of appeal on September 6, 1956. (R. 41-42.) Jurisdiction of this Court is invoked under Section 24 of the Bankruptcy Act and Section 1291, 28 U. S. C.

QUESTIONS PRESENTED

1. Whether the District Court was correct in ruling that the appellant-mortgagee was entitled to first priority in the proceeds from the assets subject to the mortgage, and that the United States was first in priority to any excess, less costs and administration expenses.

2. Whether the referee should have abandoned the properties which were subject to both the mortgage and the federal tax liens.

3. Whether the District Court erred in not allowing the mortgagee post-bankruptcy interest.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Section 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment

creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

STATEMENT

The relevant facts, as found by the referee (R. 24–27) and adopted by the District Court (R. 39–41), may be summarized as follows:

On December 1, 1945, Stockholders Publishing Company, Inc., executed a trust indenture, deed of trust, assignment, and chattel mortgage to secure an indebtedness of \$1,000,000 to Jefferson Standard Life Insurance Company. This document was recorded on

December 1, 1945, in the official records of Los Angeles County, California. (R. 24.)

On December 31, 1954, Stockholders Publishing Company, Inc., filed a petition in bankruptcy. (R. 25.)

By order of April 27, 1955, the referee in bankruptcy authorized the trustee of the bankrupt to sell free and clear of liens the real and personal property of the bankrupt. This sale took place on April 27, 1955, and \$382,500 was realized from the sale. The sale was confirmed by the referee on April 29, 1955. All liens upon the property sold were transferred to the proceeds of sale without impairment. Jefferson Standard Life Insurance Company cooperated with the trustee of the bankrupt estate and took no action to delay or hinder any sale of the assets of the bankrupt estate or the payment of principal and interest on its claim. (R. 24-25.)

As of December 31, 1954, the date of the petition in bankruptcy, the indebtedness of the bankrupt to Jefferson Standard Life Insurance Company, Inc., secured by the trust indenture, deed of trust, assignment, and chattel mortgage was \$351,223.74, inclusive of interest, plus attorney's fees. (R. 25.)

On March 14, 1952, the Collector of Internal Revenue at Los Angeles received the assessment list of 1943, 1944, and 1945 corporate income and excess profits taxes which had been assessed against Stockholders Publishing Company, Inc., on March 11, 1952. The Collector issued notices and demands for the payment of these taxes on March 18, 1952, but the sum of

\$280,800.10, inclusive of interest, remained assessed, unpaid and outstanding as of December 31, 1954. Furthermore, on February 22, 1954, and May 13, 1954, withholding and federal insurance contribution taxes for the fourth quarter of 1953, and the first quarter of 1954, were assessed and paid with the exception of a 5% penalty added for failure to make payment within 10 days after notice and demand. The unpaid amount of these penalties existing on December 31, 1954, was \$7,808.48. Notices of liens securing payment of all taxes owing to the United States by Stockholders Publishing Company, Inc., were filed in the office of the County Recorder of Los Angeles County, California, by the District Director of Internal Revenue, on December 20, 1954. (R. 25-26.)

Los Angeles County, California, on March 1, 1954, assessed real and personal property taxes for the year 1954-1955, against the property of the bankrupt for \$15,384.10, which became liens upon the four parcels of real estate which were sold by the trustee free and clear of liens. The liens of the county were transferred to the proceeds of sale and remained unpaid. (R. 26.)

The District Court held that the order of priority of payment from the proceeds of sale was as follows (R. 28-29):

1. The sum of \$351,223.74 due Jefferson Standard Life Insurance Company, and the further sum of \$3,500 representing an attorney's fee to its counsel;
2. The costs of sale and administration;
3. The lien claim of the United States for income and excess profits taxes in the sum of \$280,800.10, plus

the sum of \$7,808.48 in nonpayment penalties upon withholding and federal insurance contribution taxes for the fourth quarter of 1953, and the first quarter of 1954;

4. The sum of \$15,384.10 due to the Tax Collector for the County of Los Angeles in satisfaction of the 1954-1955 property tax levied upon the assets of the bankrupt.

The referee held, however, that \$15,384.10 should be deducted from the \$351,223.74 set aside for payment to Jefferson Standard Life Insurance Company on its lien, and that this \$15,384.10 should be paid over to the Tax Collector for the County of Los Angeles in satisfaction of the latter's claim. The referee held that the payment of the \$351,223.74, less the \$15,384.10, would fully satisfy the claim of Jefferson Standard Life Insurance Company, unless additional amounts were recovered by the trustee in bankruptcy. Any additional amounts remaining after payment of the claim of the United States should be paid to Jefferson Standard Life Insurance Company in reimbursement of the \$15,384.10 previously deducted. (R. 27, 29, 30.)

From the proceeds of sale held by the trustee in bankruptcy Jefferson Standard Life Insurance Company was paid on September 1, 1955, the sum of \$335,839.64, consisting of \$334,558.57, representing full payment of the principal of its claim remaining unpaid, plus \$16,665.17, representing interest on its claim to December 31, 1954, the date of the petition in bankruptcy, less the tax claim of Los Angeles County in the amount of \$15,384.10. (R. 26-27.)

The referee also held that none of the creditors of the bankrupt were entitled to interest on their claim after the filing of the petition in bankruptcy on December 31, 1954. (R. 30.)

On August 13, 1956, the District Court ordered that the order of the trustee, dated February 20, 1956, be affirmed and that the findings of fact and conclusions of law as made by the referee be adopted by the District Court. (R. 39-41.)

SUMMARY OF ARGUMENT

1. Under federal law appellant's mortgage lien ranks ahead of the federal tax liens. However, under the doctrine of "the first in time is the first in right" enunciated by the Supreme Court, the tax liens of the United States, having attached before the tax liens of the County of Los Angeles, rank before the latter's liens.

The United States is not interested in whether the county receives payment upon its liens prior to the mortgagee. That is a matter of local law. The federal tax lien is entitled under federal law to any funds in excess of the amounts necessary to pay the costs of administration and the mortgagee's claim.

2. A trustee in bankruptcy may abandon only property that is burdensome, or charged with liens in excess of the value, or otherwise unprofitable to the bankrupt estate. Even then, the question as to whether the trustee shall elect to take the burdensome property or to abandon it is solely a matter of discretion. Where, as here, the assets subject to the mortgagee's claim were sold for more than the principal of

the claim plus accrued interest thereon to the date of bankruptcy, the action of the District Court, in authorizing the trustee to take the property belonging to the bankrupt and to reduce the property to money by selling the assets free of liens and to transfer the lienholders' rights to the proceeds received from the sale, was not only justified but was required. The United States held a lien on the property for taxes; and it was entitled to priority of payment in any excess over the mortgagee's claim plus costs of sale and administration.

Appellant did not request that the properties be abandoned. It was present at the hearing on the trustee's petition for an order authorizing the sale of the assets, but did not oppose the sale or seek review by the District Court of the referee's orders authorizing the sale and confirming the sale. Consequently, these orders have become final, and appellant cannot later attack them collaterally on appeal for the first time.

3. The general rule in bankruptcy is well settled that interest on unsecured and secured claims runs only to the date of the petition in bankruptcy. Two recognized exceptions to this rule allow interest to run to the date of payment of the principal of the claim where the alleged bankrupt proves to be solvent or where the security subject to a claim produces income during the bankruptcy administration.

Some of the Courts of Appeals recognize a third exception to the general rule, that where the value of the security is more than sufficient to pay the principal of the secured claim, the excess should be applied

to post-petition interest on the secured obligation. This Court, however, in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10, denied secured creditors post-petition interest except to the extent that interest was paid from the income of the securities pledged as collateral, or to the extent that the bankrupt estate was fully solvent. We submit that under the rule of this Court, as expressed in *Beecher*, appellant's claim for post-petition interest in the present case should be denied.

ARGUMENT

I. The District Court correctly held that the federal tax lien was entitled to priority over all liens other than the lien of the mortgagee

The District Court did not hold that the federal lien is ahead of appellant's mortgage lien. Instead, it holds to the contrary—that under federal law appellant's lien ranks ahead of the federal tax lien, which in turn, ranks ahead of the county's liens. Appellant makes no contention, as indeed it cannot, that the local tax liens were entitled to priority of payment over the federal tax lien.

The assessment list for the federal taxes was received by the Collector of Internal Revenue on March 14, 1952, and was recorded in the office of the County Recorder of Los Angeles on December 20, 1954. (R. 25-26.) The tax liens of Los Angeles County attached on March 1, 1954. (R. 26.)

Although both the tax liens of the United States and those of the county are to be recognized under Section 67 (c) of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended (11 U. S. C. 1952 ed., Sec. 107),

nevertheless, under the doctrine of “the first in time is the first in right” enunciated by the Supreme Court in *United States v. New Britain*, 347 U. S. 81, 85, the tax liens of the United States, having attached before the tax liens of the county, rank before the latter’s liens. See Section 3671 of the Internal Revenue Code of 1939, *supra*. The fact that the county’s liens attached before notice was given of the tax liens of the United States is of no moment. They do not fall within any one of the categories set forth in Section 3672 of the Internal Revenue Code of 1939, *supra*, which requires filing of notice to be valid against a subsequent mortgagee, pledgee, purchaser or judgment creditor. As the Supreme Court holds in *New Britain*, *supra* (p. 88):

There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.

United States v. Security Tr. & Sav. Bk., 340 U. S. 47; *United States v. Gilbert Associates*, 345 U. S. 361; *United States v. New Britain*, 347 U. S. 81; *United States v. Acri*, 348 U. S. 211; *United States v. Liverpool & London Ins. Co.*, 348 U. S. 215; *United States v. Scovil*, 348 U. S. 218; *United States v. Colotta*, 350 U. S. 808, reversing *per curiam*, 79 So. 2d 474 (Miss.); *United States v. White Bear Brewing Co.*, 350 U. S. 1010, granting the petition for certiorari and summarily reversing, 227 F. 2d 359 (C. A. 7th); *California*

State Dept. of Employ. v. United States, 210 F. 2d 242 (C. A. 9th).

The appellant's contentions (Br. 5-8, 13-15) concerning what it terms "circular priorities"¹ have been directly answered by the Supreme Court in *New Britain, supra*, wherein the Court held (pp. 87-88):

The State finds the rule of "first in time, first in right" not applicable because of § 3672 of the Internal Revenue Code, which makes the lien of the United States invalid as to the prior recorded mortgages and the judgment in this case. It points out that the mortgagee could have paid the delinquent real-estate taxes and water rent, with the amount so paid becoming part of the mortgage debt covered by the mortgage lien, and suggests that the federal tax lien

¹ The term "circular priorities" as employed by appellant apparently is intended to include the situation where there are several adverse claimants, such as a mortgagee, the United States and a local government, and where the mortgagee is given a priority over the United States and the local government by federal law, and the local government is preferred over the mortgagee by local law. See *United States v. New Britain, supra*; *Spokane County v. United States*, 279 U. S. 80, 91.

The cases which have dealt with this situation have followed the same procedure which was adopted by the District Court in this case, i. e., that the United States is held not to be concerned with the order of priority of the other claimants under local law, and that the order of priority of the federal tax lien is determined solely by federal law, and only after the lien of the United States is satisfied may the priorities of the remaining lienors be classified under local law. See *Smith v. United States*, 113 F. Supp. 702 (Hawaii); *Hopkins v. Eureka Coal Co.* (C. C. Kanawha Co., W. Va.), decided February 25, 1944 (33 A. F. T. R. 1627); *Samms v. Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N. E. 2d 172; *Southern Ohio Savings Bank & Trust Co. v. Bolce*, 165 Ohio St. 201, 125 N. E. 2d 217; *Brown v. General Laundry Service, Inc.*, 19 Conn. Supp. 335, 113 A. 2d 601.

would therefore be invalid as to such amount by virtue of § 3572. From this and a belief that Congress did not intend, by giving mortgages and judgments priority over federal tax liens, to supersede state laws making certain interests superior to mortgages and judgments, the Supreme Court of Errors concluded that by enacting § 3672 Congress “expressed the intention that federal liens should be subordinated to such mortgages and judgment liens as are described therein and, consequently, subordinated to such other incumbrances as have priority over those mortgages and judgment liens.”

We do not agree. The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. * * *

Thus the District Court correctly held that the federal tax lien was entitled to the balance of the proceeds held by the trustee after the payment of the costs of administration and the payment of the mortgagee's claim which ranked prior to the federal tax lien under federal law.

II. The referee was correct in not abandoning the properties which were subject to both the mortgage and the federal tax liens

Section 67 (b) of the Bankruptcy Act, *supra*, recognizes the validity of statutory liens for taxes owing to the United States, and Section 67 (c) provides for priority of such liens; after the payment of the costs

of administration and of certain wages where personal property not in possession is involved. It is well settled that, in order to reduce the bankrupt estate's assets to cash as speedily as practicable for distribution to creditors, a bankruptcy court will, in the proper exercise of its jurisdiction, authorize a trustee to take property belonging to the bankrupt and to reduce the property to money. Sections 2, 47 and 70 of the Bankruptcy Act (11 U. S. C. 1952 ed., Secs. 11, 75 and 110). In so doing the bankruptcy court may authorize the trustee to sell the assets free of liens or charges and to transfer the lienholders' rights to the proceeds received from the sale. *Goggin v. California Labor Div.*, 336 U. S. 118, 131; 4 Collier on Bankruptcy (14th ed.), Sections 70.97 and 70.99; 6 Remington on Bankruptcy (Fifth ed.), Sections 2577, 2578, 2580, 2583 and 2587.

In the present case, the referee entered an order on April 27, 1955, which authorized the trustee in bankruptcy to sell certain properties free and clear of all liens, and provided that the liens be transferred to the proceeds of sale. (R. 3-6.) The properties were sold by the trustee at public auction on that day. On April 29, 1955, the referee issued an order confirming the sale. (R. 24.) There is nothing in the record to show that the trustee did not derive a fair price for the sale of these properties, or that appellant was prejudiced by the sale of these properties.

There is no merit to appellant's contention (Br. 16-17) that the trustee acted improperly in failing to abandon the assets subject to appellant's mortgage, or that the referee should have ordered the trustee to

abandon the property. A court of bankruptcy may abandon only property that is burdensome, or charged with liens in excess of the value, or otherwise unprofitable to the bankrupt estate. Even then, the question as to whether the court shall elect to take burdensome property or to abandon it is solely a matter of discretion. 2 Remington on Bankruptcy (1956 ed.), Sections 1142-1143.

In the present case there is not only no showing that the assets subject to appellant's claim were burdensome, but to the contrary, as appellant admits (Br. 16), the record clearly shows that these assets were sold for more than the principal of the mortgagee's claim plus accrued interest thereon to the date of bankruptcy. (R. 24, 25.) In such circumstances the action of the District Court was not only justified but was required. The United States held a lien thereon for taxes; and it was entitled to priority of payment in any excess over the mortgagee's claim plus costs of sale and administration.

Additionally, the record does not reveal that appellant made any request that the properties in question be abandoned, or that it contended at any time that the trustee's failure to abandon the property was error. Furthermore, the record reveals that appellant was present at the hearing on the trustee's petition for an order authorizing sale of the assets (R. 3); and that there is no indication in the record that appellant ever opposed the sale. The record also reveals that appellant did not seek review by the District Court of the referee's order authorizing the trustee to sell the property or of its order confirming the sale.

(R. 32-35.) Consequently, under Sections 24 and 39c of the Bankruptcy Act (11 U. S. C. 1952 ed., Secs. 47 and 67 (c)), appellant having failed to seek review of the referee's orders, these orders became final, and appellant cannot later attack them collaterally on appeal for the first time. *Sampsell v. Imperial Paper Corp.*, 313 U. S. 215, 218-219; *In re Sterling*, 125 F. 2d 104 (C. A. 9th); *Seemann v. Nat. Bank of Commerce of Houston*, 112 F. 2d 378 (C. A. 5th); *In re Kedzie Block Corp.*, 135 F. 2d 952, 955 (C. A. 7th); *Doyle v. Ponsford*, 136 F. 2d 401 (C. A. 8th); *In re San Francisco Bay Exposition*, 50 F. Supp. 344 (N. D. Cal.). Under these circumstances appellant should not be permitted to complain for the first time on appeal that the referee's order for payment is inequitable in failing to order the trustee to abandon the assets subject to appellant's claim, or by confirming the sale of the assets.

III. The referee and the District Court correctly held that appellant was not entitled to interest upon its claim after the filing of the petition in bankruptcy

The general rule in bankruptcy is well settled that interest on unsecured as well as on secured claims provable in bankruptcy runs only to the date of the petition in bankruptcy. This general rule rests upon the theory that the affairs of the bankrupt are supposed to be wound up as of the date of bankruptcy, that the delay in payment of interest is not the act of the debtor but is an act of law for the mutual benefit of the creditors, and that it would be inequitable to permit the payment of interest to certain creditors which would increase the proportion of the assets

to which these creditors are entitled at the expense of the other creditors while the estate is in the process of administration. *Sexton v. Dreyfus*, 219 U. S. 339, 344; *New York v. Saper*, 336 U. S. 328; *Vanston Committee v. Green*, 329 U. S. 156;² 3 Collier on Bankruptcy (14th ed.), Section 63.16; 6 Remington on Bankruptcy (Sixth ed.), Sections 2827 and 2869. There are, however, two recognized exceptions to this rule. The first allows interest to the date of payment of the claim where the alleged bankrupt proves to be solvent. *New York v. Saper, supra*, p. 330. The second exception permits the payment of post-petition interest on a secured claim to the extent that the security subject to such claim produces income during the bankruptcy administration. *Vanston Committee v. Green, supra*, p. 164; *Sexton v. Dreyfus, supra*, p. 346; *New York v. Saper, supra*, p. 330.

Appellant urges a third exception to the general rule—one which some Courts of Appeals have recognized—that where the value of the security is more than sufficient to pay the principal of the secured claim, the excess should be applied to post-petition interest on the secured obligation. This alleged exception apparently rests upon the theory that the collateral is security for the payment of the interest as well as for the payment of the principal, and that it is

² Cf. *United States v. General Engineering & Mfg. Co.*, 188 F. 2d 80 (C. A. 8th), affirmed *per curiam*, 342 U. S. 912; *United States v. Edens*, 189 F. 2d 876 (C. A. 4th), affirmed *per curiam*, 342 U. S. 912; *Pavone Textile Corp. v. Bloom*, 302 N. Y. 206, 97 N. E. 2d 755, affirmed *per curiam, sub nom. United States v. Bloom*, 342 U. S. 912, for proceedings in reorganization, by way of arrangement and for general assignment.

not inequitable to pay interest to a secured creditor where there is a surplus of security available for the payment of such interest.³

In *Vanston Committee v. Green*, *supra*, the Supreme Court, in holding that first mortgage bondholders were not entitled to interest on interest accruing after the commencement of an equity receivership, stated (p. 165) "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor."

Previously, in *United States v. Sampsell*, 153 F. 2d 731, this Court held that, where the security was sufficient to pay the principal of a mortgagee's claim, interest was payable to the date of payment of the principal. Following *Vanston* this Court, citing *Vanston*, denied post-petition interest to a secured creditor

³ Some of the decisions which have permitted post-petition interest to the date of payment, where the value of the security is more than sufficient to pay both principal and interest, are as follows: *Kagan v. Industrial Washing Machine Corp.*, 182 F. 2d 139, 146 (C. A. 1st); *Littleton v. Kincaid*, 179 F. 2d 848 (C. A. 4th), certiorari denied, 340 U. S. 809; *Oppenheimer v. Oldham*, 178 F. 2d 386, 389 (C. A. 5th); *In re Macomb Trailer Coach*, 200 F. 2d 611 (C. A. 6th), certiorari denied, *sub nom. McInnis, Trustee v. Weeks*, 345 U. S. 958; *In re Inland Gas Corp.* (C. A. 6th), decided February 14, 1957 (1957 P-H., par. 72,479); *United States Trust Co. of New York v. Zelle*, 191 F. 2d 822 (C. A. 8th).

On the other hand, the payment of such interest was denied in *Sword Line v. Industrial Commissioner of State of N. Y.*, 212 F. 2d 865 (C. A. 2d), certiorari denied, *sub nom. Industrial Commissioner of New York v. Sword Line*, 348 U. S. 830, and *National Foundry Co. of N. Y. v. Director*, 229 F. 2d 149 (C. A. 2d). See *In re Riddlesburg Mining Co.*, 224 F. 2d 834 (C. A. 3d).

in *Pacific States Corp. v. Hall*, 166 F. 2d 668, upon the ground that from the record this Court could not determine (p. 672) “the value of the security and the relative equities between the secured creditor and the subordinate creditors * * *.”

More recently, in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10, this Court denied post-petition interest to a mortgagee and to a county which held a lien upon specific property of the bankrupt estate for unpaid taxes and assessments. In *Beecher*, this Court pointed out (p. 14) that, except where the bankrupt estate turns out to be fully solvent, or the securities yield income, the only time when interest after bankruptcy on secured claims is allowed is where the courts have discovered equitable reasons for doing so, citing *Vanston Committee v. Green, supra*. As petitioners there had not presented any equitable reason for a departure from general principles, the allowance of interest on the secured claims was allowed after bankruptcy only to the extent that interest was paid from the income of securities pledged as collateral, or to the extent that the bankrupt estate was fully solvent. This Court also stated (p. 14, fn. 4) that its decision in *United States v. Sampsell, supra*, allowing post-petition interest on a secured claim “was necessarily overruled by the Supreme Court in the Vanston case which followed the Sampsell case.”

Beecher, we submit, is controlling here; hence appellant is not entitled to post-petition interest. In *Beecher*, as in the present case, there were conflicting claims of several secured creditors. In the present

case the security did not produce income; and the amount realized from the sale of the assets in the bankrupt estate was not sufficient to cover the principal of the liens thereon. Hence, payment to appellant of post-petition interest would reduce the amount of principal which the United States would recover on its tax liens. See also *In re Pollard Bros.*, 128 F. Supp. 818 (S. D. Cal.).

The question of post-petition interest to secured creditors is presently under consideration by this Court in *Palo Alto Mutual Savings and Loan Assn. v. Ralph E. Williams, Trustee in Bankruptcy of John E. Duskin*, No. 15,105, which is to be argued before this Court *en banc* on April 9, 1957. In *Palo Alto* the property subject to the lien was sold for a sum sufficient to pay the principal amount of first lienholder, together with interest thereon to date of payment, but for a sum insufficient to pay in full the principal of the second deeds of trust on the same property. The referee and the District Court there denied post-petition interest to the first lienholder, relying upon the decision of this Court in *Beecher*.

CONCLUSION

For the reasons stated, the order of the District Court affirming the order of the referee should be affirmed by this Court.

Respectfully submitted.

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MARCH 1957.

No. 15349

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON STANDARD LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, H. L. BYRAM, County Tax Collector of Los Angeles County, and GEORGE T. GOGGIN, Trustee of STOCKHOLDERS PUBLISHING COMPANY, INC., a corporation, Bankrupt,

Appellees.

APPELLANT'S REPLY BRIEF.

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Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary Remarks.

The notable thing about the briefs of the three appellees is that they have not weakened, or indeed seriously challenged, the basic premises upon which appellant rests its case. Specifically, the contentions of appellant which appellees appear to have accepted, or at any rate to be unable to deny, are as follows:

1. Federal law is controlling to determine the priority of secured claims in bankruptcy administration.
2. Federal law is controlling to determine the relative priorities of a federal tax lien and other liens.
3. By federal law, appellant's lien ranks first, the lien of the United States ranks second, and the lien of Los Angeles County ranks third and last.

4. The Bankruptcy Act contemplates a uniform equitable system of priorities in distribution.

5. Where a state law is inequitable, it may be disregarded by a bankruptcy court.

6. The security of a lien creditor should be preserved unimpaired.

7. The order for distribution appealed from is self-contradictory and has no logical basis, but is based on a rule that will make bankruptcy administration arbitrary, variable, uncertain and unpredictable.

8. The order appealed from subordinates appellant's lien to liens to which it is entitled to priority by statute.

9. The order appealed from uses appellant's money to pay the debt owed by the bankrupt to the Los Angeles County Tax Collector.

While the County Tax Collector in his brief says that the order of the District Court is equitable (Br. 10), he has not been able to say how or why it is equitable, nor has he attempted to refute appellant's demonstration that the order is, in fact, arbitrary and inequitable. His argument comes down to an appeal to the necessities of local government, and to the proposition that local taxes by their inherent virtue should be paid ahead of all other claims.

As to the government's brief, we believe it may fairly be characterized as follows. The government does not deny that by federal law, and as declared by the Supreme Court in *United States v. New Britain*,¹ the lien that is first in time is entitled to priority in the absence of special

¹347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367.

statutory provision to the contrary. Instead, the government seeks to distract attention from the federal rule by capitalizing the Supreme Court's dictum that the United States is not interested in the collection of local taxes, and by embarking on an inquiry into the powers of a bankruptcy court to sell assets free from liens, which we believe to be irrelevant.

The presupposition of both briefs is that it is fair and reasonable that a local tax lien be paid ahead of a prior mortgage lien, any law or equity to the contrary notwithstanding. The County Tax Collector says that the order of the District Court is correct because local taxes must be paid. The Department of Justice says that the order is correct because the United States does not care whether local taxes are paid or not, so long as someone else's money is appropriated for the purpose. We believe that the major premise is not consistent with American notions of due process of law or with the Constitution of the United States or of any state.

Since the briefs of appellees deal with different subjects for the most part, we will discuss them separately.

I.

The Brief for the United States.

As to Circular Priorities.

We submit that in its brief the government has not faced the issues in this case, but has gone off, perhaps inadvertently, into a fruitless inquiry whether the bankruptcy court had the power to order a sale of assets free and clear of liens. The burden of its argument seems to be that the District Court *held* that Jefferson Standard was entitled to first priority in the proceeds of sale, and that since Jefferson Standard did not oppose the order

for sale, it is somehow collaterally estopped from attacking the order for payment from which this appeal is taken.

The issues, as we understand them and attempted to state them in our opening brief, are (1) does controlling federal law give priority to the senior lien claim of appellant under the first in time rule, and require payment of appellant's claim ahead of the junior lien claims of the United States and Los Angeles County; (2) was federal law applied by the District Court; (3) if state law is controlling and entitles the junior lien of Los Angeles County to priority over the senior lien of appellant, should the bankruptcy court have applied state law where it is inequitable to do so.

The government's brief in large part is an exercise in the use of words to obscure the meaning of words. At page 2, and again at page 10, it is stated that the District Court held or ruled that appellant's lien was entitled to first priority, and that the federal tax lien in turn ranked ahead of the county tax lien. It is true that the District Court *said* that Jefferson Standard was entitled to first priority [R. 28], but what it actually *held* was that the claim of Los Angeles County should be paid in full, the claim of appellant should be paid in part, the claim of the United States should be paid in full (to the extent of available assets), and finally the balance of appellant's claim should be paid if surplus assets ever became available [R. 30].

The order the court made is what we are appealing from, and we do not think it can fairly be said that the court's actual order did anything else than subordinate the liens of both Jefferson Standard and the United States to that of Los Angeles County, and subordinate the lien of Jefferson Standard in part to that of the United States,

which is directly contrary to the federal law which the District Court purported to recognize as controlling.

Counsel for the United States (Br. 12) refer to “circular priorities” as though the term were a novelty to them, as well it might be. As we have pointed out (Op. Br. 5-8), the term has no legal significance, but is a semantic device constructed by some courts when faced with conflicting claims of priority to a fund insufficient to pay all lien claims, and to enable them to order the prior payment of local tax liens as “the most equitable solution,” thereby circumventing controlling federal law. We have also pointed out (Op. Br. 7, 16-17) that in the case at bar there was no such problem requiring any such “equitable” solution, because the fund was more than sufficient to pay the liens of both Jefferson Standard and Los Angeles County. By command of the statute (I. R. C. 3672), the government stands aside while appellant is paid. A conflict would arise only between the United States and Los Angeles County as to the surplus, and would be easily resolved because the county must yield, as it hesitantly concedes (Br. 2).

The government cites, as it must, *United States v. New Britain*, *supra*, but omits to quote the relevant part of the opinion,² where the Supreme Court said, referring to the universal rule that the lien that is first in time is the first in right:

“We think that Congress had this cardinal rule in mind when it enacted §3670, a schedule of priority not being set forth therein.”

²Quoted in appellant’s opening brief, pages 12-13.

Instead the government quotes (Br. 12-13) the part of the opinion in which the Supreme Court rejected the argument advanced against the first in time rule, and which incidentally discredits the rationale of many of the decisions upon which appellees here rely. Counsel seize upon the Supreme Court's remark that the United States is not concerned with the collection of local taxes, as though it were a warrant to ignore the law.

Of course, as the government states (Br. 12, n. 1), the United States is not concerned whether local taxes are paid or not, but it is concerned with the priority of liens where federal tax liens are involved and is also concerned in bankruptcy administration, and there by federal law liens must be given rank in the order of the time of their creation. As a matter of statutory interpretation, does the government really mean to contend that under I. R. C. 3671 the federal lien is satisfied and the United States no longer interested as soon as a fund is merely allocated to a prior mortgage claim, even though all or part of that fund is ordered paid to a local tax claimant whose lien is inferior to that of the United States under I. R. C. 3672? We submit that priority means priority in payment, not priority on paper or in findings of fact and conclusions of law. We further submit that the mandate of Congress and the United States Supreme Court cannot be evaded by a form of words or any such device as "setting aside" a fund equal to appellant's prior lien claim, but then ordering payment to someone else. We do not believe that the legal requirement of priority of payment of a lien claim is satisfied by a mere bookkeeping entry not followed by an actual cash disbursement. It may be that the government is satisfied because the District Court's order has given the

United States priority over appellant to the extent of the county tax claim, but appellant is not satisfied, and we do not believe that the order satisfied the act of Congress which declares that appellant's lien shall be given priority over that of the United States.

Contrary to the government's statement (Br. 8), we think that the United States is interested in whether Los Angeles County receives payment prior to appellant. What the government means is that it is not interested so long as the payment is made *out of appellant's money*. That is a result of which it can approve and which the District Court has called equitable.

The government's argument (Br. 8-9, 14-15) that appellant cannot object to the *order for payment* because it did not oppose the *order for sale* seems to be without merit. It is based in part on a misunderstanding of the record or of the applicable law, or both. At pages 8-9 and again at page 15 of the government's brief it is said that the assets were sold for more than appellant's mortgage claim, so that the trustee could not have abandoned the property. The rule, of course, is that the trustee may and should abandon the property unless its value exceeds the total of *all lien claims*, so that there will be an equity for the estate.

Counsel overlooked the fact that the aggregate lien claims greatly exceeded the value of the property (see Op. Br. 2), so that the sale was of no benefit to the estate. Of course, appellant does not contend "that the referee's order for payment is inequitable in failing to order the trustee to abandon the assets subject to appellant's claim, or by confirming the sale of the assets" (Br. 16). Appellant does not attack the order confirming sale, col-

laterally or otherwise. Appellant does attack the order for payment from which this appeal is taken, and complains that said order is inequitable because it deprives appellant of the security to which it was lawfully entitled, all for the benefit of Los Angeles County and the United States without any possibility of benefit to the general creditors whom alone the court's equitable powers may be invoked to protect, and complains that it is doubly inequitable because the bankruptcy court should not have interfered in the first place.

With that circularity of reasoning which afflicts all those who espouse the doctrine of circular priority in order to attain a desired "most equitable result," the government argues as follows (Br. 15-16): The trustee was *required* to retain the assets and sell them free of liens; the District Court's election to retain or abandon the property was *solely a matter of discretion*; ergo, appellant should have opposed the order for sale and appealed from the order of confirmation, and because it did not do so, appellant is estopped from attacking the order for distribution of the proceeds which subordinated its lien and impaired its security.

The argument is difficult to appreciate. If the sale was required or was a matter of absolute discretion, how could appellant have opposed it? In fact, there was no reason why appellant should have opposed the sale, and there were many reasons why it should not. On the record, it was reasonable to suppose that the proceeds would equal or exceed appellant's claim, although there was little prospect that they would equal the amount of all lien claims. The liens were transferred to the proceeds of sale. Appellant certainly could not have been expected to anticipate that the District Court would

subsequently make an erroneous order for distribution impairing the priority of its claim. Moreover, purposeless opposition to the sale would have gravely prejudiced appellant's right to post-bankruptcy interest on its claim, by exposing it to the charge of having delayed administration of the estate by prolonged and unwarranted litigation.

As to Post-bankruptcy Interest.

The United States has not attempted to impeach the authorities upon which appellant relies in support of its claim to post-bankruptcy interest,³ nor has it been able to demonstrate any defect in appellant's analysis of this court's own decisions which we think, when rightly understood, are consistent with those authorities and also support appellant's claim to post-bankruptcy interest.

More important, the United States has not shown any equitable reason why appellant's claim to post-bankruptcy interest should be denied. The government does point out (Br. 20) that payment of post-bankruptcy interest to appellant would reduce the amount available for payment to the United States. The force of this argument escapes us, since the federal tax lien is admittedly inferior to appellant's mortgage lien. We have never understood that it is a proper function of a bankruptcy court to insure ratable distribution to secured claimants whose liens have different priorities.

³Cases cited as *contra* (Br. 18, n. 3) are tax claim cases and accordingly are not in point. (See *City of N. Y. v. Saper*, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554.)

II.

The County Tax Collector's Brief.

The County Tax Collector has not been able to cite any statute or decision to support his contention that the lien for county taxes is entitled to priority over the antecedent contract lien of appellant under the law of California. The authorities cited (Br. 4) are either dicta in decisions concerning the effect of tax sales or tax deeds, or have even less relevance to the subject of priority between tax liens and contract liens. We are not concerned here with the effect of tax sales or tax deeds, or with the relative rank of special assessment and general tax liens, but are concerned solely with the relative priority of contract liens and tax liens.

It is significant that the County Tax Collector has not attempted to meet or overcome the effect of California Civil Code, Section 2897 as the controlling statute, or the decisions cited by appellant (Op. Br. 18-19) applying that statute to determine the priority between contract liens and tax liens.

Rather, the County Tax Collector refers to county taxes as "the life blood of government," and as "the backbone of the financial structure of local government" (Br. 4-5). This is a restatement of the out-moded superior dignity rule. Further, the County Tax Collector speaks as though the taxes on the mortgaged property were an obligation of Jefferson Standard which it ought to have paid (Br. 6-7). On the contrary, the tax was assessed to the owner (as required by Rev. and Tax Code, Sec. 405) and was a lien on the property assessed and on that only (Rev. and Tax. Code, Sec. 2187). Indeed, Article XIII, Section 1 of the California Constitution expressly provides that a mortgage or deed of trust is not property

subject to taxation. The tax in question was not assessed to Jefferson Standard or against property owned by Jefferson Standard, and Jefferson Standard is in no way obligated to pay the tax (*Cf.*, 3 *G Distillery Corp. v. Los Angeles County*, 46 Cal. App. 2d 498, 116 P. 2d 143; *Sherman v. Quinn*, 31 Cal. 2d 661, 192 P. 2d 17).

As to the claimed inherent superiority of the lien for county taxes, we can do no better than to quote the remarks of the late Professor J. C. Peppin, who reviewed the whole subject in his article "Priority of Tax and Special Assessment Liens," (1935) 23 Cal. L. Rev. 264, 265-266, 276:

"While the general rule ordinarily applied in determining the priority of conflicting liens on the same property is that expressed in the maxim *qui prior est tempore, potior est jure*, the question whether such ordinary rule does or does not apply where one or more of the liens involved are tax liens has been the cause of great divergence of judicial opinion. This divergence of opinion has been brought about by the early adoption of, and the dogged persistence of numerous courts in adhering to, the view that because of the importance of the functions of government and the necessity of raising promptly the revenues necessary to carry out such functions, the obligation to pay taxes is necessarily of much greater dignity and on a much higher plane than ordinary obligations, whether secured or unsecured, and therefore must be accorded some inherent priority over them. The history of the law on this subject has been colored almost completely by the extent to which this principle, styled here for convenience of reference as the 'superior dignity' principle, has been either followed or rejected by the courts. In general,

it will be seen that the principle gained an early foothold and was widely followed for many years, but that later cases have been a series of recessions from it, until today it seems to have been definitely discredited in so far as it is sought to be used as a justification for holding either that taxes are *ex proprio vigore* 'liens' or that tax liens are *ex proprio vigore* 'first' liens, i.e., superior to other liens.

* * * * *

"The modern view would seem to be eminently sound. According to tax liens a preference over private liens seems to work out badly in practice and to result in frequent examples of injustice. Furthermore, if the prior satisfaction of earlier private liens will have the effect of hampering the government in the collection of its revenues, it would seem to be the peculiar province of the legislature to say so by expressly making taxes a preferred lien, which it unquestionably has the power to do. Its failure to say so would seem to be conclusive evidence that no such hampering effect is deemed by the legislature to exist. For courts to undertake to say that it does exist, when the legislature has not, seems to the writer to be the baldest example of judicial legislation."

Conclusion.

It is all very well that local government be supported and that local taxes be paid. The question is, how and by whom?

Under our American system of government, local taxes should be collected by orderly process of law and by legal and constitutional means in accordance with law—not by judicial legislation, or by judicial fiat thinly disguised as equity.

The legislature of the State of California could, by lawful process, have declared the lien for county taxes paramount and entitled to first priority over all other liens, but it has not done so. The Congress of the United States could have ratified such legislation or passed a similar law of its own, but it has not done so, and instead of so doing has (as interpreted by the Supreme Court) not chosen to enforce the collection of local taxes, but rather has declared all liens entitled to priority in the order of the time of their creation.

Congress is supreme in this field. Where Congress has spoken, its enactments should not be circumvented by an alleged "equitable solution" to a dilemma invoked by the District Court through its disregard of the law; nor can the priority of appellant's lien be evaded by any form of words which results in the use of appellant's money to pay another person's debt.

The order appealed from further impairs appellant's security by denying its claim to post-bankruptcy interest, despite the fact that the security was more than ample and no equitable reason appears why the claim should not have been allowed. In all other Circuits, such interest would have been paid without question.

We submit that the order of the District Court must and should be reversed.

Respectfully submitted,

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In the
United States Court of Appeals
For the Ninth Circuit

JEFFERSON STANDARD LIFE
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U.S.A., H. L. BYRAM, County Tax Col-
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of Stockholders Publishing Company,
Inc., a corporation, Bankrupt.,

Appellees.

PETITION FOR REHEARING
BY APPELLEE H. L. BYRAM,
COUNTY TAX COLLECTOR
OF THE COUNTY OF LOS ANGELES

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In the
United States Court of Appeals
For the Ninth Circuit

JEFFERSON STANDARD LIFE
INSURANCE COMPANY, a cor-
poration,

Appellant,

vs.

U.S.A., H. L. BYRAM, County Tax Col-
lector of the County of Los Angeles,
and GEORGE T. GOGGIN, Trustee
of Stockholders Publishing Company,
Inc., a corporation, Bankrupt.,

Appellees.

No. 15349

PETITION FOR REHEARING
BY APPELLEE H. L. BYRAM,
COUNTY TAX COLLECTOR
OF THE COUNTY OF LOS ANGELES

*To the United States Court of Appeals for the Ninth
Circuit, and the Judges Thereof:*

Comes now H. L. BYRAM, County Tax Collector
of the County of Los Angeles, and Appellee in the
above entitled cause, and presents this his Petition for
Rehearing in the above entitled cause and in support
thereof respectfully shows:

SUMMARY STATEMENT

That a rehearing should be granted in this case on the following grounds: That this Honorable Court erred in its interpretation of California law and in failing to follow the interpretation thereof by the highest courts of the State of California and by a former decision of this Court. The judgment of the District Court should have been sustained upholding the county's position that its tax lien was prior to all private liens. That by reason of such erroneous conclusion as to the status of county tax liens as against private mortgage liens this court did not decide the important question of "circular priorities" involved in this case.

ARGUMENT

I.

California constitutional and statutory provisions provide that tax liens are superior to private liens. Some of these are as follows:

"All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership" (California Constitution, Article XIII, Sec. 1.)

“All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.” (Sec. 201, Rev. and Tax. Code of the State of Calif.)

“Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o’clock meridian of the first Monday in March. The assessor shall ascertain such property between the first Mondays in March and July.” (Sec. 405, Rev. and Tax. Code of the State of Calif.)

“The board of supervisors shall fix the rates of county and district taxes and shall levy the State, county, and district taxes as provided by law.” (Sec. 2151, Rev. and Tax. Code of the State of Calif.)

“Every tax has the effect of a judgment against the person.” (Sec. 2186, Rev. and Tax. Code of the State of Calif.)

“Every tax on real property is a lien against the property assessed.” (Sec. 2187, Rev. and Tax. Code of the State of Calif.)

“Every tax on improvements is a lien on the taxable land on which they are located, if they are assessed to the same person to whom the land is assessed.” (Sec. 2188, Rev. and Tax. Code of the State of Calif.)

“All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.” (Sec. 2192, Rev. and Tax. Code of the State of Calif.)

“Every lien created by this division has the effect of an execution duly levied against the property subject to the lien.” (Sec. 2193, Rev. and Tax. Code of the State of Calif.)

“Except as otherwise provided in this chapter, the judgment is satisfied and the lien removed when, but not before,

“(a) the tax is paid or legally canceled or,

“(b) for nonpayment of any taxes, the property is sold to a private purchaser or deeded to the State.” (Sec. 2194, Rev. and Tax. Code of the State of Calif.)

“After thirty years succeeding the time, heretofore or hereafter, when any tax becomes a lien, if the lien has not been otherwise removed, the lien ceases to exist and the tax is conclusively presumed to be paid. The official having charge of the records of the tax shall mark it ‘conclusively presumed paid.’ ” (Sec. 2195, Rev. and Tax. Code of the State of Calif.)

“The tax collector shall collect all property taxes except as otherwise expressly provided.” (Sec. 2602, Rev. and Tax. Code of the State of Calif.)

“If an assessee of property on the unsecured roll moves to another county, the official collecting taxes on the unsecured roll in the county in which the property was assessed may employ an attorney to sue for and collect the taxes in such official’s name. This does not relieve such official from any duties.” (Sec. 3002, Rev. and Tax. Code of the State of Calif.)

“Where delinquent taxes or assessments are not a lien on real property sufficient, in the judg-

ment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs." (Sec. 3003, Rev. and Tax. Code of the State of Calif.)

"In any suit for taxes the roll, or a duly certified copy of any entry, showing the assessee, the property, and unpaid taxes or assessments, is *prima facie* evidence of the plaintiff's right to recover." (Sec. 3004, Rev. and Tax. Code of the State of Calif.)

"Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." (Sec. 3711, Rev. and Tax. Code of the State of Calif.)

"The deed conveys title to the purchaser free of all encumbrances of any kind existing before the sale, except:

"(a) Any lien for installments of special assessments, which installments will become payable upon the secured roll after the time of the sale.

"(b) The lien for taxes or assessments or other rights of any taxing agency which does not consent to the sale under this chapter.

"(c) Liens for special assessments levied upon the property conveyed which were, at the time of the sale under this chapter, not included in the amount necessary to redeem the property from the sale to the State, and, where a taxing agency which collects its own taxes has consented to the sale under this chapter, not included in the amount

required to redeem from sale to such taxing agency.

“(d) Easements constituting servitudes upon or burdens to the property; water rights, the record title to which is held separately from the title to the property; and restrictions of record.” (Sec. 3712, Rev. and Tax. Code of the State of Calif.)

“It is hereby declared to be the policy of the State and the intent of the provisions in this code contained, that the final tax deed or deeds of all taxing agencies, including counties, cities and counties, cities, irrigation districts, reclamation districts, and other taxing agencies that annually levy, assess and collect taxes or assessments upon real property within the State, should be and they are hereby declared to be upon a parity with each other, and that regardless of when the levy of such taxes or assessments is or has been made, and regardless of when the final tax deed or assessment deed is or has been taken by such taxing agency, that the rights of all taxing agencies and all such deeds shall be equal and upon a parity with each other.” (Sec. 3900, Rev. and Tax. Code of the State of Calif.)

II.

That the constitutional and statutory provisions above mentioned and their predecessors in the Political Code have been construed by the state courts as giving tax and special assessment liens priority over private liens regardless of when the private lines attach.

In addition to those cases cited on pages 4 to 6 of this Appellee's Brief on Appeal, see the following:

California Loan & Trust Co. v. Weis (118 Cal. 489, 50 P. 697) where a general property tax lien was held paramount under Political Code sections almost identical with the present Revenue and Taxation Code sections, which the court found to be sufficient, *ex proprio vigore*; the court said at pages 493 to 495:

“It still remains to be considered, before leaving this branch of the case, whether the legislature of this state has, in the exercise of an unquestioned power, made the lien of its taxes paramount. As this matter, the power being conceded, depends for its determination entirely upon statutory enactment, adjudications in sister states will be of little value unless based upon identical laws.

“Our Political Code provides: ‘Sec. 3713. Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year.’

“‘Sec. 3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.’

“After further provisions for the sale of the real property for all such delinquent taxes, it is provided:

“ ‘Sec. 3788. The deed conveys to the grantee the absolute title to the land described therein . . . free of all encumbrances, except the lien for taxes which may have attached subsequent to the sale.’

“No distinction is made by these laws between the lien which exists upon the land for the tax on personalty and the lien which exists for the tax upon the land itself. ‘Every lien’ created by this title remains until the taxes are paid or the property sold. The title which the purchaser gets under the enforcement of any tax lien by sale is free from all encumbrances. ‘A lien for taxes does not stand upon the footing of an ordinary encumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to identical ownership, and when it is enforced by sale pursuant to statute the purchaser takes a valid and unimpeachable title.’ (*Osterberg v. Union Trust Co.*, 93 U.S. 424.) The mandate of our statutes puts all tax liens upon the same plane; *makes them all paramount to other liens*, and under sale for their enforcement gives to the purchaser a title free and unencumbered.

“ . . . But it is obvious that they have no weight in this consideration when the laws of our state put all tax liens upon an equality and *make each and all superior to any other charge upon the land*.

“No doubt can be entertained but that this is the true and only reasonable interpretation of the effect of our code provisions.

“It is held in *Eaton’s Appeal*, 83 Pa. St. 152, that a statute which declares that a tax shall con-

tinue a lien 'until fully paid and discharged' *ex proprio vigore* makes the lien superior to that of a judgment obtained before the tax is levied. In this state we not only have language of similar import in Section 2716 of the Political Code, but that language is aided so as to remove the need of interpretation by Section 3788, which provides that the deed conveys the absolute title free from all encumbrances." (Emphasis added.)

Pauley v. State of California (9th Cir.) 75 F. 2d 120, 132-134 (a gasoline tax case, but applying the same code sections.)

III.

The court should have followed the interpretation of California law as laid down by its own prior decision, *Pauley v. State of California*, *supra*.

IV.

This Honorable Court should not itself interpret California statutes, disregarding prior interpretation thereof by the highest state courts.

V.

On the other hand, this court should not have relied on *Fresno County v. Commodity Credit Corp.*, (9th CCA), 112 F. 2d 639, which is not in point inasmuch as it involves a claimed lien resulting from assessment and seizure of personal property on the unsecured roll for nonpayment of taxes by the owner.

The trustee, in his brief on file herein (pp. 4-5) concedes the correctness of the county's tax claim herein.

CONCLUSION

It is submitted that a rehearing should be granted herein.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel
and

ANDREW O. PORTER,
Deputy County Counsel

*Attorneys for Appellee H. L. Byram,
Tax Collector of the County of Los Angeles.*

CERTIFICATE OF COUNSEL

The undersigned, ANDREW O. PORTER, Deputy County Counsel of the County of Los Angeles, and one of the attorneys for the Appellee H. L. Byram, Tax Collector of the County of Los Angeles, does hereby certify that in his judgment the above Petition for Rehearing is well founded and is not interposed for delay.

ANDREW O. PORTER

No. 15,353

IN THE

United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,

Appellant,

VS.

PAUL J. MADIGAN, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

FILED

JAN 15 1957

PAUL P. O'BRIEN, CLERK

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No. 15,353

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WINSTON CHURCHILL HENRY,

Appellant,

vs.

PAUL J. MADIGAN, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant petitioned for a writ of habeas corpus on May 9, 1956 on the ground that the Warden of Alcatraz Penitentiary improperly interpreted the term of the sentences under which he was confined (Tr. 1-4). The District Court issued an order to show cause why a writ of habeas corpus ought not to be granted on May 10, 1956 (Tr. 11). On May 21, 1956

respondent, appellee here, filed a return to the order to show cause (Tr. 12-19). This return incorporated, among other things, the two judgments and commitments concerning which question is made here. Petitioner was first sentenced on January 26, 1950 in the District of Hawaii for violation of the narcotic laws (Tr. 14). On the first count of the indictment he was sentenced to a term of four years and to pay a fine of \$1,000. On the second count of the indictment he was sentenced to a term of two years and to pay a fine of \$1,000; "the sentences of imprisonment to run consecutively." (Tr. 15). On May 3, 1951 the defendant was sentenced for another violation of the narcotic laws (Tr. 17). Appellant's sentence under this judgment provided that he was to be committed to the custody of the Attorney General for imprisonment for a period of two years "to run consecutively with any *sentences* now serving." (Emphasis added). On June 5, 1956, a hearing was held before the Honorable Edward P. Murphy, district judge, and it was ordered that the petition for habeas corpus be denied, and the order to show cause discharged (Tr. 20). Appeal was then timely made to this Court from Judge Murphy's order (Tr. 21).

QUESTIONS PRESENTED.

- I. DOES THE USE OF THE PREPOSITION "WITH" IN CONJUNCTION WITH THE WORD CONSECUTIVE PRECLUDE THE IMPOSITION OF A CONSECUTIVE SENTENCE?
- II. WHEN A JUDGMENT READS "TO RUN CONSECUTIVELY WITH ANY SENTENCES NOW SERVING, AND PETITIONER IS SERVING TWO SENTENCES, DOES THE SENTENCE COMMENCE TO RUN AT THE EXPIRATION OF THE TERM OF THE FIRST SENTENCE, OR OF THE SECOND SENTENCE?

ARGUMENT.

- I. THE USE OF THE PREPOSITION "WITH" DOES NOT PRECLUDE THE IMPOSITION OF A CONSECUTIVE SENTENCE.

Appellant relies on the case of *Bledsoe v. Johnston* (9th Cir.), 154 F. 2d 458, in support of his contention that the use of the preposition "with" prevents an effective judgment for consecutive sentences. The *Bledsoe* case does contain language which lends some support to petitioner's contention. However, the portion of the case relied upon by appellant was the *purest dicta*. It was unnecessary to the decision in the case. This Court, since the *Bledsoe* case, has been faced with the contention made by appellant on numerous occasions. In each case this Court has observed that the statement made in the *Bledsoe* case was mere dicta, unnecessary to the decision in the case, and did not represent a holding on the part of this Court of Appeals. In *Butterfield v. Wilkinson* (9th Cir.), 215 F. 2d 320, this Court stated:

"As respects the use of the phrase 'consecutively with' rather than 'consecutively to' it seems to us that for all practical purposes one manner of putting it is as clear as the other."

Prior to the *Bledsoe* case, this Court directly held that a sentence to run “consecutively with another sentence” was properly interpreted to run consecutively.

Martini v. Johnston (9th Cir.), 103 F. 2d 597, cert. den.

The *Bledsoe v. Johnston* dicta was also laid to rest in the case of *Lipscomb v. Madigan* (9th Cir.), 224 F. 2d 410. The most recent case in which this Court passed on a judgment in which the phrase “consecutive with” was used is the case of *Colbert v. Madigan* (9th Cir.), 229 F. 2d 157. The same contention made here was made there. The Court held:

“There was no merit in any of these contentions. The plain meaning of the above quoted language of the judgment in action No. 15298 was that the sentence imposed in that action should begin at the expiration of the sentence imposed in action No. 15127, and that the two sentences should run consecutively, not concurrently.”

In *U. S. v. Daugherty*, 269 U.S. 360, the Supreme Court said that while “sentences in criminal cases should reveal with fair certainty the intent of the Court and the exclusion of any serious misapprehensions by those that must execute them, the elimination of every possible doubt cannot be demanded.” It might be in more accord with the necessity of English grammar to use the preposition “to” rather than the preposition “with”. However, the use by the Court of the word consecutively precludes any intention that the sentence should run concurrently. The Hawaii Court obviously intended that the judgment order run consecutively since it used the word consecutively. In-

interpreting consecutively to read concurrently would be a clear perversion of the sentencing Court's intentment.

II. THE COURT INTENDED THAT ITS JUDGMENT ORDER RUN CONSECUTIVELY WITH ANY SENTENCE NOW SERVING.
(Emphasis added.)

The record at page 18 shows that the plural "sentences" was in fact used by the Hawaii Court. Appellant quotes some language from the case of *Mayes v. Madigan*, Civil No. 35004, in the United States District Court for the Northern District of California, Southern Division, reported at 137 F. Supp. 1. The opinion in the *Mayes* case, as originally reported, relied on the cases of *Kirk v. United States*, 185 F. 2d 185, and *Crow v. U. S.*, 186 F. 2d 704. There the Court stated:

"A prisoner serving the first of several consecutive sentences is not serving the other sentences."

Subsequent to the original decision in the *Mayes* case, the Supreme Court in the case of *Affronti v. U. S.*, 350 U.S. 79, disapproved the *Kirk* case. It is to be noted in the *Affronti* case the Supreme Court consistently treated a sentence which is composed of several consecutively running counts as one general sentence. This would seem to be in accord with the policy of Section 4641 of Title 18 *U.S.C.*, which treats a series of sentences in the aggregate as one general sentence. See also Section 4643 of Title 18 *U.S.C.*, in which release is ordered at the expiration of the "term of

sentence.” However, in the present case we do not reach the problem posed in the *Mayes* case. Appellant was serving two sentences at the time of the May 3, 1951 judgment. The Court by the use of the plural sentences obviously referred to the aggregate sentence consisting of sentences on two counts of the indictment. Furthermore, the use of the word “any” imports an intent that appellant’s sentence on the May 3, 1951 judgment should commence following the expiration of all terms of imprisonment which petitioner was then serving. As was stated in the *Daugherty* case supra, “The elimination of every possible doubt cannot be demanded.” This judgment, however, makes it completely clear that the May 3, 1951 sentence should follow the sentence imposed on November 26, 1950, where consecutive sentences were imposed on separate counts of the indictment.

The judgment below should be affirmed.

Dated, San Francisco, California,

January 9, 1957.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15354

United States
Court of Appeals
for the Ninth Circuit

A. E. STOKES and ESTELLE STOKES,
Appellants,
vs.

JAMES H. REEVES and ISHAM P. NELSON,
JR., Doing Business as Reeves and Nelson,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Montana, Billings Division

FILED

FEB - 8 1957

PAUL P. O'BRIEN, CLERK

No. 15354

United States
Court of Appeals
for the Ninth Circuit

A. E. STOKES and ESTELLE STOKES,
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vs.

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Appellees.

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Appeal from the United States District Court for the
District of Montana, Billings Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

STERLING M. WOOD,
Securities Building,
Billings, Montana,
For Appellants.

FRED DUGAN,
309 Electric Building,
Billings, Montana;

YALE B. GRIFFIS,
207 Empire State Bank Building,
Dallas, Texas,
For Appellees.



In the District Court of the United States in and
for the District of Montana, Billings Division

Civil Action No. 1570

JAMES H. REEVES AND ISHAM P. NELSON,
JR., d/b/a REEVES & NELSON,

vs.

A. E. STOKES AND WIFE, ESTELLE
STOKES,

COMPLAINT ON ACCOUNT

Comes now James H. Reeves and Isham P. Nelson, Jr., d/b/a Reeves & Nelson, Certified Public Accountants, plaintiffs, complaining of A. E. Stokes and wife, Estelle Stokes, defendants, and for cause of action respectfully show as follows:

I.

That jurisdiction of this cause of action is founded on diversity of citizenship and amount in controversy. That plaintiffs are citizens of Dallas, Dallas County, Texas, and defendants are citizens of Sidney, Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars and no/100 (\$3,000.00).

II.

Defendants owe plaintiffs, for professional services rendered to the defendants as Certified Public Accountants, Three Thousand Thirty-eight Dollars and Twenty-two Cents (\$3,038.22) according to the account hereto annexed as Exhibit "A."

III.

That in accordance with Revised Statutes of the State of Texas, Article 2226, this claim was presented to the defendants for payment on the date of September 16, 1953; that thirty (30) days have expired since such presentation and the claim has not been paid or satisfied, and plaintiffs are, therefore, entitled to a reasonable attorney's fee for bringing this suit, which fee plaintiffs allege an amount of Seven Hundred Fifty Dollars and no/100 (\$750.00) is reasonable.

Wherefore, plaintiffs demand judgment against defendants, jointly and severally, for the sum of Three Thousand Thirty-eight Dollars and Twenty-two Cents (\$3,038.22), plus Seven Hundred Fifty Dollars (\$750.00) attorney's fees, and costs.

/s/ FRED N. DUGAN,

/s/ YALE B. GRIFFIS,

Attorneys for Plaintiffs.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendants:

You are hereby summoned and required to serve upon Fred N. Dugan, plaintiff's attorney, whose address is 309 Electric Building, Billings, Montana, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of

this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated December 29, 1953.

[Seal] H. H. WALKER,
Clerk of Court;

By /s/ ELIZABETH C. McKEE,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1954.

United States District Court for the District of
Montana, Billings Division

Civil Action File No. 1570

JAMES H. REEVES AND ISHAM P. NELSON,
JR., d/b/a REEVES & NELSON,

Plaintiffs,

vs.

A. E. STOKES AND WIFE, ESTELLE
STOKES,

Defendants.

ALIAS SUMMONS

To the Above-Named Defendants:

You are hereby summoned and required to serve upon Fred N. Dugan, plaintiffs' attorney, whose

address is 309 Electric Building, Billings, Montana, an answer to the complaint which herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 18, 1954.

[Seal] H. H. WALKER,
Clerk of Court;

By /s/ ELIZABETH C. McKEE,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT
A. E. STOKES

Comes now the defendant, A. E. Stokes, in the above-entitled action, by and through the undersigned, his attorneys, and for his amended answer to plaintiffs' complaint, filed by leave of court, alleges:

First Defense

That he denies each, all and every of the allegations of paragraphs I, II and III of plaintiffs' complaint.

Second Defense

That on or about the 9th day of September, 1952, plaintiffs and this answering defendant made and entered into an agreement wherein and whereby the plaintiffs agreed to prepare certain income tax returns for this answering defendant for a total service charge of \$1500. and that no other or further agreement for professional services has been made heretofore by this answering defendant with the said plaintiffs.

Third Defense

That the court does not have jurisdiction of the subject matter in the above-entitled action by reason of the allegations of the Second Defense in this answer contained, which are made a part hereof by reference.

Wherefore, this answering defendant prays that the said action may be dismissed as to him and that he may recover his costs of suit herein incurred.

STERLING M. WOOD,
R. E. COOKE,
F. D. MOULTON,
W. H. BELLINGHAM,

By /s/ STERLING M. WOOD,
Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed August 23, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANT
ESTELLE STOKES

Comes now the defendant, Estelle Stokes, in the above-entitled action, by and through the undersigned, her attorneys, and for her amended answer to plaintiffs' complaint, filed by leave of court, alleges:

First Defense

That she denies each, all and every of the allegations of paragraphs I, II and III of plaintiff's complaint.

Second Defense

That the only professional services rendered heretofore to this answering defendant by the plaintiffs were for the preparation of her individual tax returns for 1951 and 1952, and at an agreed price of \$250 for such services, and that on or about the 9th day of September, 1952, this answering defendant paid the said plaintiffs in full for the services by them rendered in the preparation of such reports.

Third Defense

That the court does not have jurisdiction of the subject matter in the above-entitled action by reason of the allegations of the Second Defense in this answer contained, which are made a part hereof by reference.

Wherefore, this answering defendant prays that the said action may be dismissed as to her and that she may recover her costs of suit herein incurred.

STERLING M. WOOD,
R. E. COOKE,
F. D. MOULTON,
W. H. BELLINGHAM,

By /s/ STERLING M. WOOD,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed August 23, 1954.

In the District Court of the United States in and
for the District of Montana, Billings Division

Civil Action No. 1570

JAMES H. REEVES AND ISHAM P. NELSON,
JR., d/b/a REEVES & NELSON,

Plaintiffs,

vs.

A. E. STOKES AND WIFE, ESTELLE
STOKES,

Defendants.

JUDGMENT

This cause came on for trial before the Court, sitting without a jury, on December 5, 1955, both parties appearing by counsel, and the issues having

been tried, and the Court having rendered decision for the Plaintiff in the sum of \$2,000.00, together with interest thereon at the rate of six per cent (6%) per annum, from the 31st day of July, 1955, and for an attorney's fee in the amount of \$400.00, and for Plaintiffs' costs of suit herein incurred, it is hereby

Ordered, Adjudged and Decreed that the Plaintiffs, James H. Reeves and Isham P. Nelson, Jr., d/b/a Reeves & Nelson, recover of and from the Defendants, A. E. Stokes, and wife, Estelle Stokes, the sum of \$2,000.00, with interest at the rate of six per cent (6%) per annum from the 31st day of July, 1953; an attorney's fee in the sum of \$400.00, and Plaintiffs' costs of action hereby taxed in the sum of \$93.25.

Dated this 4th day of September, 1956.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed and noted September 4, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that A. E. Stokes and Estelle Stokes, Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the

above-entitled action on the 4th day of September, 1956.

Dated this 1st day of October, A.D. 1956.

/s/ STERLING M. WOOD,

Attorney for Appellants, A. E.

Stokes and Estelle Stokes.

[Endorsed]: Filed October 3, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS OF APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives and successors are bound to pay to the above-named Plaintiffs the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this bond is that whereas the Defendants, A. E. Stokes and Estelle Stokes, have appealed to the Court of Appeals for the Ninth Circuit, by their Notice of Appeal duly filed, from the judgment of this court entered September 4, 1956, if the said Defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment is affirmed or such costs as the appellate court may award if the judgment is modified, then this bond to be void, but if the Defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated October 1st, 1956.

A. E. STOKES and
ESTELLE STOKES,

By /s/ STERLING M. WOOD,
Their Attorney-in-Fact,
Defendants and Appellants.

[Seal] UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ [Indistinguishable],
Attorney-in-Fact, Surety.

[Endorsed]: Filed October 3, 1956.

[Title of District Court and Cause.]

STIPULATION

Pursuant to the provisions of Paragraph (f) of Rule 75 of the Federal Rules of Civil Procedure, it is hereby stipulated by and between the undersigned attorneys for the respective parties to the above-entitled action that the parts of the record, proceedings and evidence to be included in the record on appeal in the above-entitled action to the Court of Appeals for the Ninth Circuit shall be as follows, to wit:

1. The summons issued in said action.

2. The pleadings consisting of the complaint and the amended answers thereto of the respective defendants.

3. The transcript of the trial proceedings on December 5, 1955, as set forth in the transcript prepared by the court reporter and covered by his certificate bearing date of April 4, 1956, together with all the exhibits.

4. The judgment made and entered in said action.

5. The notice of appeal of the defendants from the aforesaid judgment, together with the bond on appeal, and this stipulation.

Dated at Billings, Montana, this 19th day of October, A.D. 1956.

/s/ STERLING M. WOOD,
Attorney for Defendants.

/s/ FRED L. DUGAN,
Attorney for Plaintiffs.

[Endorsed]: Filed October 20, 1956.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil No. 1570

JAMES H. REEVES, et al.,

Plaintiff,

vs.

A. E. STOKES, et al.,

Defendant.

Before: Honorable Charles N. Pray.

December 5, 1955

Appearances:

MR. FRED DUGAN,

For Plaintiff.

MR. STERLING WOOD,

For Defendant.

Proceedings

The above-entitled cause came on regularly for trial in the Federal Building at Billings, Montana, on December 5, 1955, before the Honorable Charles N. Pray, presiding, without a jury.

Whereupon the following proceedings were had and done, to wit:

The Court: Call the next case.

The Clerk: No. 1570, James H. Reeves and others vs. A. E. Stokes and others for trial.

The Court: How about this case, gentlemen. are you ready to proceed this morning?

Mr. Dugan: Plaintiff is ready for trial, your Honor.

Mr. Wood: Defendants are ready, your Honor.

The Court: Perhaps you might make a brief statement for the record, Mr. Dugan, and then Mr. Wood can make a short statement of his position.

Mr. Dugan: May it please the court, and Mr. Wood. Your Honor, this cause is one filed by James H. Reeves and Isham P. Nelson, Jr., doing business as Reeves and Nelson, a co-partnership, against A. E. Stokes and his wife, Estelle Stokes. It is a complaint on an account and sets forth essentially that the jurisdiction is founded on diversity of citizenship, that the plaintiffs are citizens of the [4*] State of Texas, of Dallas County, Dallas, and the defendants are residents and citizens of Sidney, Montana, at the time of the filing of the complaint, and the matter in controversy exceeds \$3,000.

And it is set forth that the defendants owe the plaintiffs for professional services rendered as Certified Public Accountants the amount of \$3,038.22 according to the exhibit annexed to the complaint which constitutes a statement of account.

And the complaint further sets forth that in accordance with a particular provision of the Statutes of the State of Texas, Article 2226, the claim was presented for payment and 30 days elapsed since such presentation and the claim has not been paid and that the plaintiffs are therefore entitled to attorney's fees for bringing the suit, alleging the

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

reasonable amount for attorney's fees to be \$750.00.

To that complaint there have been now amended answers filed separately on behalf of the defendant of which there is general denial of all allegations of the complaint and a defense raised by the defendant, A. E. Stokes, that on the 9th day of September, 1952, that the plaintiffs and defendant, individual defendant, A. E. Stokes, agreed that the plaintiffs would prepare the federal income tax statements for an agreed sum of \$1,500, and no more, and a [5] third defense alleged that the court does not have jurisdiction by reason of the allegations of the second defense that the amount is less than \$3,000; and a separate defense on behalf of the defendant Estelle C. Stokes denying all allegations of Plaintiffs' complaint and alleging that the only professional services rendered for this defendant, Estelle Stokes, was for the preparation of individual income tax returns for the years 1951 and 1952 at an agreed price of \$250; and that on the 9th day of September, 1952, that sum was paid by that defendant to these plaintiffs, and further, that the third defense that the amount in controversy is not \$3,000.

Your Honor, we will attempt to show in this cause an account stated for services rendered by the plaintiffs to the defendants and implied agreement to pay the amount exhibited in the account stated. We will also produce for the judicial notice to be taken by the court the appropriate Texas statute.

The Court: Mr. Wood.

Mr. Wood: I see no occasion for making a statement now, your Honor.

Mr. Dugan: Plaintiff calls as his witness, himself.

JAMES H. REEVES

one of plaintiffs, was duly sworn and testified as follows: [6]

Direct Examination

By Mr. Dugan:

Q. Will you state your name, please, and address and occupation?

A. James H. Reeves, Dallas, Texas. I am a C.P.A.

Q. Were you such C.P.A. during the period of 1946 to 1953? A. Yes, sir.

Q. Do you have your certificate with you of your license? A. Yes, sir.

Mr. Wood: We concede that without your putting it in there that he is a C.P.A.

Q. And his associate is also a C.P.A. at the time of filing of the action?

Mr. Wood: Meaning the other plaintiff in the lawsuit?

Mr. Dugan: Yes.

Mr. Wood: Yes.

Q. (By Mr. Dugan): During the latter part of the period 1946 to 1953 were you associated in a partnership with Mr. Isham Nelson, Jr.?

A. Yes.

Q. In a firm of CPA's? [7]

Q. And that is the other plaintiff named in the action? A. Yes, sir.

(Testimony of James H. Reeves.)

Q. Do you know the defendants, Stokes?

A. I know Mrs. Stokes.

Q. Did I understand you to say Mrs. Stokes?

A. I know Mr. Stokes.

Q. For how long have you known Mr. Stokes?

A. Since 1946.

Q. What is Mr. Stokes occupation, if you know?

A. He is an oil and gas operator; oil and gas lease operator to my knowledge.

Q. The date of the filing of the suit herein which was in December, 1953, as the record reveals——

Mr. Wood: That is 1954.

Mr. Dugan: 1953, I believe.

Mr. Wood: It is marked 1954.

Mr. Dugan: I may be in error on that.

The Court: You mean, Mr. Dugan, does he know Mr. A. E. Stokes, the defendant in the case? You didn't establish that.

Mr. Dugan: I thought I had.

Q. (By Mr. Dugan): Mr. Reeves, do you know the defendant in the case, A. E. Stokes?

A. Yes. [8]

Q. Would you point him out to the court?

A. That is Mr. Stokes sitting there.

Q. Sitting next to the window? A. Yes.

Q. And did I understand you to say you don't know Mrs. A. E. Stokes? A. No; I do not.

Q. You stated you have known Mr. Stokes since '46? A. '46.

Q. Now, the complaint in this action is marked

(Testimony of James H. Reeves.)

as having been signed December 29, 1953, and I ask you whether at that time and for a short period time at least prior to that time what was his residence if you know?

A. P.O. Box 276, Sidney, Montana.

Q. His residence was Sidney, Montana?

A. Yes, sir.

Q. And did you address mail to him there?

A. Yes, sir.

Q. Did you receive replies from mail addressed to there? A. Yes.

Q. Did you telephone him and reach him in Sidney, Montana? A. Yes.

Q. Do you know where the defendants were served with process in this case? [9]

A. Sidney, Montana.

Q. Do you know where they were living say in the year '52?

A. I first called them at the Lalonde Hotel in Sidney, Montana, and I got him there for a while, and after a while they began referring me to another telephone number; they said he moved to an apartment.

Mr. Wood: The only reason I said something about January, 1954, is the papers on the alias summons were served on January 18, 1954, that was the only discussion I had.

Q. Those apartments at which you reached the defendants by phone were in Sidney, Montana?

A. Yes, sir.

(Testimony of James H. Reeves.)

Q. And that was during the year 1953?

A. Yes.

Q. And shortly before the filing of the suit here of perhaps a period of months before the last knowledge you have of the defendants was at that point, was it? A. Yes.

Q. Prior to the time in 1953 did you have any business transactions with the defendants?

A. Yes; Mr. Stokes engaged me to file income tax returns and do audit work for him.

Q. The last part of your statement wasn't clear.

A. Mr. Stokes engaged me to file income tax returns [10] and to do audit work for him.

Q. When did these business transactions originate?

A. They actually originated in 1946; he asked me advice from time to time and I talked to him on the telephone and I actually got the work in hand to do in April of 1952.

Q. What was the general nature of the business to do at that time?

A. Well, I filed, I did audit work and filed income tax returns for Mr. Stokes for his first wife and his second wife and for two partnerships he was concerned in over the period 1946 to 1952, inclusive.

Q. Including among those returns were returns for the defendant, Estelle Stokes?

A. Yes. I believe I called her Evelyn a moment ago; it is Estelle Stokes.

Q. The name of his present wife is Estelle

(Testimony of James H. Reeves.)

Stokes? A. Yes; that is right.

Q. Did you start the preparation of these returns then in April, 1952? A. April, 1952.

Q. And when did you complete them?

A. April 3rd, 1953.

Q. Why did it take such a long period to prepare these returns?

A. Well, the years involved, well a period of time had [11] gone by and the business transactions were complicated and it was frequently necessary to contact the company involved and call Mr. Stokes in order to get information from him to enable us to proceed.

Q. Was it important that these returns be prepared with the utmost accuracy?

A. Yes; it was, because the returns were delinquent.

Q. Preliminary to your preparation of these returns did you have a conversation with either of the defendants regarding the terms of the payment for your services? A. Yes; I did.

Q. When was this and where was it?

A. Well, I went to Gainsville, Texas, with my partner, Mr. Nelson, to pick up the work from Mr. Stokes on April 16th, 1952.

Q. And did you go to a residence or office address of the Defendant?

A. Yes; he had his office in his home at that time.

Q. Did you go to his home? A. Yes.

Q. Who was present there besides yourself and

(Testimony of James H. Reeves.)

Mr. Nelson? A. Mr. Stokes.

Q. What was the conversation with respect to terms of payment, if anything?

A. I told Mr. Stokes at the time I thought the amount of [12] work was considerable and that I couldn't afford to carry it and that I would appreciate it if he would make interim payments as the work progressed.

Q. As your work on this progressed did you make any demands for payment pursuant to your understanding? A. Yes, sir.

Q. In what form did you make these demands?

A. Orally and by letter and also on long distance telephone.

Q. Prior to September, 1952, did the defendants make any payments on account? A. No.

Q. On September 15, 1952, did you receive a payment? A. Yes; I received \$250.

Q. Prior to that time you had received no payments at all?

A. No; I received a lot of promises but no money.

Q. After September, 1952—15th, 1952, did you receive any payments on account? A. No, sir.

Q. When did you complete the returns?

A. April 3, 1953.

Q. At that time did you make any demand upon the defendants for payment?

A. Yes: I saw Mr. Stokes and there were con-

(Testimony of James H. Reeves.)

ferences with he and my partner concerning the terms of payment. [13]

A. That was at 207 Empire Bank Building, Dallas, Texas, in my office.

Q. And at a later time did you again present statements of your account?

A. Yes, sir; I omitted the telephone calls which I should have charged him with and I rendered an amended bill in July of 1952.

Q. 1950 what? A. 1953.

Mr. Wood: He did what? He rendered a bill?

Q. Will you answer it again?

A. I rendered Mr. Stokes an amended bill in July of 1953 and included the telephone charges that I should have included in the original bill.

Q. Do you recall the date of the month?

A. I don't believe I could recall the date accurately; it was in July, I know.

Q. How was this statement rendered to the defendants? A. We mailed it to them.

Q. And to whom was it directed?

A. Mr. and Mrs. A. E. Stokes, Post Office Box 276, Sidney, Montana.

Q. Who mailed it? A. My secretary.

Q. At whose direction? [14] A. Mine.

Q. Where was it mailed?

A. Mailed in the mail box in the bank building.

Q. Before the mailing did you examine the statement, the envelope and the contents that were in the envelope? A. Yes.

(Testimony of James H. Reeves.)

Q. And you say they were addressed to what address?

A. Mr. and Mrs. A. E. Stokes, P.O. Box 276, Sidney, Montana.

Q. Did the envelope carry a return address?

A. The engraved business envelope for myself and my partner did carry a return address.

Q. It did carry a return address? A. Yes.

Q. Which was what?

A. 207 Empire Bank Building, Dallas, Texas.

Q. Had you previously addressed mail to the defendants at Post Office Box 276, Sidney, Montana? A. Yes.

Q. How long before that time?

A. Possibly 6 or 7 months.

Q. And was that previous mail received?

A. Yes.

Q. How do you know it was received?

A. Because he replied and I was in touch with him up [15] to that time.

Q. Did you ever have a conversation with either of the defendants regarding this statement about which you have been testifying?

A. Yes; he was in my office.

Q. What date now, please?

A. I believe in August of 1953.

Q. Who was present?

A. Myself, Mr. Nelson and Mr. Yale B. Griffis and Mrs. Stokes.

Q. What was said if anything by Mr. Stokes at that time regarding the statements?

(Testimony of James H. Reeves.)

A. Well, he just said he couldn't pay it.

Q. Except for this conversation in August, 1953, did you otherwise hear from either of the defendants in response to this statement up to the time of the filing of this lawsuit? A. No.

Q. Did either of the defendants ever communicate to you or make any statement to you that the statement of account was inaccurate up to the time of filing this lawsuit? A. No.

Q. Did the defendants or either of them ever return the statement by you sent to them in July?

A. No, sir.

Q. Never returned them? [16] A. No, sir.

Q. Did you send the defendants any further copies of the statement after July, 1953?

A. I believe there was one with the complaint.

Q. Other than that you sent them no other statements? A. No.

Mr. Dugan: At this time pursuant to the notice to produce on file in the cause and served on the defendants' attorneys we call upon the defendants to produce the original copy of the invoice or statement dated April 3, 1953, and sent to the defendants in July, 1953.

Mr. Wood: We have no such statement.

Q. I hand you a document marked Plaintiffs' Exhibit No. 1 and ask you to state what it is?

A. This is a statement from Reeves & Nelson, Certified Public Accountants, Empire State Bank Building, Dallas, Texas.

Q. Don't read the contents. I am going to ask

(Testimony of James H. Reeves.)

you whether or not this is a copy of the statement about which you have previously testified as having been sent out in July, 1953? A. Yes.

Q. Is it a true and exact carbon copy of that statement? A. Yes.

Q. And the date it bears of April 3, 1953, is not the date on which it was sent out? [17]

A. No, sir; the statement was mailed in July.

Q. The date appearing at the top of the instrument referred to date of completion of the account or service?

A. April 3, 1953, pertains to the date we completed the work and also to the statement on which we presented the original bill.

Mr. Dugan: Subject to objection by counsel for the defendants we offer in evidence Plaintiffs' Exhibit 1.

PLAINTIFFS' EXHIBIT No. 1

Case No. 1570, James H. Reeves, et al., vs. A. E. Stokes, et al.

Reeves & Nelson
Certified Public Accountants
Empire State Bank Building
Dallas, Texas

Date: April 3, 1953.

Invoice No. 2066.

(Testimony of James H. Reeves.)

Mr. and Mrs. A. E. Stokes,
P.O. Box 276,
Sidney, Montana.

Professional Services rendered as follows:

Analysis and examination of books and records of account, and miscellaneous data required for filing U. S. tax returns as follows:

1. 1946 U. S. Individual Income Tax Return for A. E. Stokes;
2. 1946 U. S. Individual Income Tax Return for Evelyn F. Stokes;
3. 1947 U. S. Individual Income Tax Return for A. E. Stokes;
4. 1947 U. S. Individual Income Tax Return for Evelyn F. Stokes;
5. 1948 U. S. Individual Income Tax Return for A. E. Stokes;
6. 1948 U. S. Individual Income Tax Return for Evelyn F. Stokes;
7. 1949 U. S. Individual Income Tax Return for A. E. Stokes;
8. 1950 U. S. Individual Income Tax Return for A. E. Stokes;
9. 1951 U. S. Individual Income Tax Return for A. E. Stokes;
10. 1951 U. S. Individual Income Tax Return for Estelle Stokes;
11. 1952 U. S. Individual Income Tax Return for A. E. Stokes, together with extension granted to June 15, 1953;

(Testimony of James H. Reeves.)

12. 1952 U. S. Individual Income Tax Return for Estelle Stokes, together with extension granted to June 15, 1953;

13. 1946 U. S. Partnership Return of Income for the period, May 14 to December 31, 1946, for Allied Lumber Company;

14. 1947 U. S. Partnership Return of Income for Allied Lumber Company;

15. Final Return—1948 U. S. Return of Income for the period, January 1 to September 8, 1948, for Allied Lumber Company;

16. Final Return—1948 U. S. Partnership Return of Income for the period, November 1, 1948, to July 31, 1949, for Air Base City;

Conferences in connection with the above.

James H. Reeves, C.P.A.

28 days at \$35.00 per diem. \$ 980.00

Isham P. Nelson, Jr., C.P.A.

42½ days at \$35.00 per diem. 1,417.50

B. B. Wright, C.P.A.

16 days at \$30.00 per diem. 480.00

\$2,877.50

Add:

Telephone Calls. 400.00

Travel Expense

Dallas to Gainesville and return. . . 10.72

\$3,288.22

(Testimony of James H. Reeves.)

Less:

Payment received..... 250.00

Balance Due..... \$3,038.22

Received in evidence December 5, 1955.

Mr. Wood: I would like to glance at it. Insofar as Estelle Stokes is concerned it is objected to as irrelevant and incompetent for any purpose whatsoever.

The Court: Well, we won't stop to look at it now; I will receive it subject to the objection. You understand it is received subject to his objection?

Mr. Dugan: Subject to his objection.

Q. (By Mr. Dugan): What is the amount shown as the balance due in Plaintiffs' Exhibit No. 1? A. \$3,038.22.

Q. Have the defendants or either of them paid this or any part of the \$3,038.22 shown in Plaintiffs' Exhibit No. 1? A. No, sir.

Q. Have you computed the interest on \$3,038.22 from July, 1953, to this date at 6% per annum?

A. Yes, sir. [18]

Q. And how much is that interest?

A. That would be \$486.08.

Mr. Dugan: At this time, your Honor, we wish to ask the court to take judicial notice of the laws of the State of Texas, particularly section or article 2226 of the civil statutes of the State of Texas, and

(Testimony of James H. Reeves.)

at this time I hand to the court Volume 7 of Vernon Civil Statutes, State of Texas, Annotated, containing that section.

The Court: Show it to counsel.

Mr. Dugan: I also wish to call to the court's attention that that numbered section has been amended by the Acts of 1953 as shown in the annotation in the pocket parts; however, that the effective date of the amendment is 90 days after May 27, 1953, date of adjournment, or which would be after the date of the presentation of the statement.

The Court: The statute is amended as shown in the supplement attached to the volume?

Mr. Dugan: Yes, sir; it is a pocket part.

Mr. Wood: To which each of the defendants objects as wholly incompetent and irrelevant for any purpose; the question of competency is not directed at the character of the proof but it is incompetent in this lawsuit or irrelevant for any purpose.

The Court: What is the purpose of introducing this statute of Texas? [19]

Mr. Dugan: Your Honor, the place at which this cause of action arose and was to be paid was in the State of Texas, at Dallas, Texas. According to the references contained in the trial brief presented your Honor previously the locale determines the question of attorney's fees as a part of the substantive law of the claim. I could put that this way, that the right to recover attorney's fees under this statute is part of the substantive law of the State of Texas and goes along with the cause of action and

(Testimony of James H. Reeves.)

accordingly under this court taking judicial notice and recognizing the laws of the State of Texas——

The Court: Suppose you read that part of the statute that is applicable here according to your statement into the record so that it may go into the record and then the court will receive it subject to objection of counsel.

Mr. Wood: There is no use keeping the book, isn't that it, so they may have the book back?

The Court: Yes.

Mr. Wood: I am willing to have it read into the record.

The Court: Just that portion applicable here.

Mr. Dugan: Very well, I will just read that part. "Article 2226. Attorney's fees. Any person having a valid claim against a person or corporation for personal services rendered, labor done, materials furnished, overcharges, or [20] freight or express lost, or damaged freight or express, or stock killed or injured, and they present the same to such person or corporation or to any duly authorized agent thereof; and, if at the expiration of 30 days thereafter the claim has not been paid or satisfied and he should finally obtain judgment for any amount thereof as presented to such person or corporation, he may also recover in addition to his claim and costs a reasonable amount as attorney's fees, if represented by an attorney."

The Court: You better note the statute that you have been reading and also have the volume and title and whatever identifies that particular statute.

(Testimony of James H. Reeves.)

Mr. Dugan: Obtained on page 219, Volume 7 of Vernon's Civil Statutes of the State of Texas, Annotated, published and compiled in 1950.

The Court: You spoke of an amendment. Does that change the wording of what you just indicated?

Mr. Dugan: The amendment as I read it over carefully didn't seem to change it materially, your Honor; however, it does appear the amendment would not take effect until after the date of rendition of this statement.

The Court: Very well.

Mr. Dugan: And that, however, was contained in this volume in a pocket part, included and further referred to as 1954 Cumulative Annual Pocket Part for use during 1954 or 1955. [21]

Mr. Wood: Instead of arguing matters now and delaying trial of the case I presume we will have an opportunity to present a brief and present this particular law question. I want the court to understand I don't think the statute has any application whatever.

The Court: You will have an opportunity later on.

Mr. Dugan: I am through with this witness.

Cross-Examination

By Mr. Wood:

Q. Mr. Reeves, you have made it very plain I think, have you not, that you do not know Mrs. Stokes and have never had any contact with her at all, am I correct? A. That is exactly right.

(Testimony of James H. Reeves.)

Q. And the first time you have seen her is today in court?

A. I think I saw her earlier today at the hotel but this is the first time.

Q. All of that is prior to the bringing of this lawsuit, '52 and '53 you didn't know her or didn't see her?

A. That is right.

Q. Now, you said you knew Mr. Stokes for a number of years in '46 and thereafter?

A. Yes, sir. [22]

Q. Mr. Stokes was very ill at the time during much of that period?

Mr. Dugan: I object to that as irrelevant and immaterial.

The Court: Well, I don't know; let him answer the question.

Q. (By Mr. Wood): He was, was he not?

A. I don't know that he was; I was told that he was.

Q. You did not know yourself?

A. I don't know of my own knowledge. I was told.

Q. I was wondering if you yourself knew anything about his condition during that period?

A. No, sir.

Q. Now, as I understood you your contacts were then merely sort of friendly and casual during the period '46 or until '52 or thereabouts?

A. They were more than friendly; we were talking business.

(Testimony of James H. Reeves.)

Q. But you didn't transact any business, did you, for him?

A. No; I didn't actually do anything for Mr. Stokes that I intended to charge him a fee for until I got his audit work in my office.

Q. And that was I think you said in '52 in the spring, or April?

A. April 16, 1952, I believe. [23]

Q. What did he do at that time, turn over some books to you?

A. They weren't exactly books. They were more or less original records, that is to say, checks and cancelled checks, check stub pad slips, duplicate slips and so forth, as well as I believe two sets of very, very incomplete records.

Q. You mean book records? A. Yes.

Q. And then you kept those until I suppose '53, was it?

A. That is right, I had those in my file box.

Q. Over in your office?

A. Yes; they were there, that is right.

Q. You did until '53 and it was about that time you completed the work; is that correct?

A. I completed the work April 3, 1953. Mr. Stokes got those records from my office some time in July or August, 1953.

Q. Of 1953? A. Yes, sir.

Q. And during that period from April, 1952, to April, 1953, did you have any contacts with Mr. Stokes with respect to this work that you were doing?

(Testimony of James H. Reeves.)

A. That is from April, 1952, to April, 1953; yes, sir.

Q. You did? A. Yes, sir.

Q. Do you remember in particular having had any contacts [24] with him in September, 1952?

A. Yes.

Q. Isn't it a fact that he was then living in Oklahoma City, Oklahoma?

A. Sir, I made a trip to Oklahoma City to see Mr. Stokes and did see him in Oklahoma City and whether he was living there I couldn't say.

Q. He was not living in Texas then, was he?

A. I couldn't say, sir.

Q. Beg your pardon? A. I couldn't say.

Q. Let me ask you this. Did you on or about the 9th day of September, 1952, have any contact with Mr. Stokes in your office? A. Yes.

Q. And did you discuss the matter of the work that you were doing, discuss it with him?

A. Yes, sir.

Q. And as a matter of fact you discussed the making of all of the various reports that are listed in this schedule attached to this complaint; am I correct? A. Yes, sir.

Q. Did you discuss the matter of your charges with him at that time?

Mr. Dugan: Your Honor, to which we object; the theory [25] of the plaintiffs' cause is that this statement of an account stated on July, 1953, constituted in law a new and separate contract, according to the theory of an account stated, and that any previous

(Testimony of James H. Reeves.)

negotiation or agreements would have been merged and consolidated in the account stated if there was such an account stated; accordingly, that this matter is irrelevant and not responsive to the issues of the case.

The Court: I will let him go into that because there is a question whether or not we will have to settle later on whether it is an account stated, and therefore, he may question the witness subject to your objection.

Mr. Wood: On top of that if I might say a few things for the record so the court will understand our position, it is expressly stated so far as Mrs. Stokes is concerned, she had no contract with the man or didn't even know the man; that as far as Mr. Stokes is concerned the position is taken that there was a contract made for a definite sum and no other contract exists between the parties.

The Court: For a definite sum?

Mr. Wood: A definite sum which is not the sum demanded in the complaint.

Q. (By Mr. Wood): Now, I am asking you then, Mr. Reeves, whether you had any conversation or talk on this thing what you wanted [26] with Mr. Stokes the early part of September, 1952, with reference to your charges? A. Yes, sir; I was.

Q. Just simply say, yes you did or did not.

A. I did.

Q. But you haven't detailed that in your testimony just so far?

A. Sir, I am not a lawyer and I will try to

(Testimony of James H. Reeves.)

answer your questions the best I possibly can if you will allow me to. The discussion I had with Mr. Stokes all the time was trying to get him to pay for my work.

Q. Was that the nature of your talk in September, 1952? A. It certainly was.

Q. Was that the only thing said?

A. Plus the fact he paid me \$250 on account.

Q. He paid you that on account?

A. Yes; he did.

Q. Isn't it the fact the check given you was the check of Mrs. Stokes?

A. He had in his possession a check signed by Mrs. Estelle L. Stokes; he made the check out for \$200.

Q. \$200?

A. \$250. I considered it part payment on account, although it wasn't the money he had been promising to pay me. [27]

Q. We will not go into that now. The extent of your conversation then was with reference to the fact of the obligation according to your version of it, is that correct, that was the character of your talk with him at that time?

A. Sir, that conversation had nothing to do with anything in the world except he paid me but \$250 on account.

Q. Nothing else was mentioned?

A. Not to my knowledge except I was complaining pretty good about not getting paid.

Q. You would not then be willing to say or you

(Testimony of James H. Reeves.)

didn't say at that time an arrangement was made with respect to your charges?

A. I will say there definitely was not, sir.

Q. There was not, all right, that is all I wanted to know. Now then, as a matter of fact in 1953—well, before going into that and so that there won't be any question about it in the matter of the check.

The Witness: Sir, may I please say one word to my attorney?

The Court: Let your counsel direct your conversation and put anything you want to testify to, you better speak to him about it; he can talk to you on redirect examination.

Q. (By Mr. Wood): Just handing you, Mr. Reeves, a document that has been marked for the purpose of this lawsuit as Defendants' [28] Exhibit No. 2, and I will ask you to state if you have seen that check before; just say yes or no.

A. Yes, sir.

Q. And is this endorsement upon the check of Reeves and Nelson your endorsement?

A. Yes, sir.

Q. And the document, Defendants' Exhibit No. 2 is a check; is it not? A. That is right, sir.

Mr. Wood: I am not putting it in evidence yet.

Q. (By Mr. Wood): Now, Mr. Reeves, you have said that you sent a statement to Mr. and Mrs. Stokes, as I understood you, of your claimed account in the summer of 1953; is that correct?

A. Yes, sir.

(Testimony of James H. Reeves.)

Q. And how did you send it; just ordinary mail?

A. Yes, sir.

Q. And did you get an acknowledgment of it?

A. No, sir.

Q. Now, following that particular action upon your part, isn't it a fact that you brought a lawsuit in Texas? A. Pardon me?

Q. After this particular transaction of mailing in the summer of 1953 did you not bring a lawsuit in Texas against the two defendants here? [29]

Mr. Dugan: Your Honor, we object to the matter of some other lawsuit as being irrelevant, incompetent and immaterial and not the best evidence, this witness not being competent.

The Court: Well, we will let it go in subject to the objection; it may have some bearing on the case that I don't anticipate now; you may question him in regard to the matter.

Q. (By Mr. Wood): I am handing you herewith a document marked for identification Defendants' Exhibit No. 3, Mr. Reeves, and I will ask you to look over these papers and then I will ask you another question.

A. All right, sir; I have seen it before.

Q. You have seen these papers before?

A. Yes; not those but some others like them.

Q. But as a matter of fact these papers show according to their face that you and Mr. Nelson as Reeves and Nelson brought a suit——

Mr. Dugan: Now, we object to counsel testifying from the documents not in evidence.

(Testimony of James H. Reeves.)

Mr. Wood: I picked up the wrong document; I am sorry. I thought I had the right one but I am sorry. So we will just ask you to mark it again, the same one.

Mr. Dugan: Now, may the record show that counsel for the defendants has substituted another paper and stricken [30] some paper about which he was interrogating the witness, a document now marked Defendants' Exhibit No. 3.

Q. (By Mr. Wood): I now hand you herewith a document marked Defendants' Exhibit 3, Mr. Reeves and I will ask you whether or not you know anything about the matters referred to there in that document?

Mr. Dugan: May we have a continuing objection on the same grounds?

The Court: Yes. You object to the whole proceeding?

Mr. Dugan: Yes, sir; this is a copy of the proceedings.

Mr. Dugan: Restrict yourself to the questions which are put to you.

Q. (By Mr. Wood): You are familiar with the proceedings referred to in this endorsement?

A. Yes.

Q. Isn't it a fact that they represent proceedings brought by Reeves and Nelson in Texas in the federal court and upon this same account that is made the subject of this suit? A. Yes, sir.

Q. What happened to that lawsuit down there?

A. We lost it [31]

(Testimony of James H. Reeves.)

Q. It was dismissed, wasn't it?

A. Well, sir, I am not an attorney but I believe it was a question of jurisdiction.

Q. Well, it was dismissed, was it not?

A. It was transferred as I understood it but not dismissed.

Q. Is it still pending down there?

A. It was transferred up here.

Q. That is your idea?

A. Well, it is probably a pretty good one.

Mr. Wood: We now offer in evidence Defendants' Exhibit 3.

Mr. Dugan: To which we object.

The Court: Received subject to objection.

DEFENDANTS' EXHIBIT No. 3

Summons in a Civil Action

Case No. 1570

United States District Court for the Northern
District of Texas, Dallas Division

Civil Action File No. 5255

JAMES H. REEVES and ISHAM P. NELSON,
JR., dba Reeves & Nelson,

Plaintiffs,

vs.

A. E. STOKES, and Wife, ESTELLE STOKES,
Defendants.

To the above-named Defendants:

(Testimony of James H. Reeves.)

Defendants' Exhibit No. 3—(Continued)

You are hereby summoned and required to serve upon Yale B. Griffis, plaintiffs' attorney, whose address is 207 Empire State Bank Building, Dallas, Texas, an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] GEORGE W. PARKER,
Clerk of Court;

/s/ LILLIAN HAMILTON,
Deputy Clerk.

Date: Aug. 14, 1953.

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(Testimony of James H. Reeves.)

Defendants' Exhibit No. 3—(Continued)

In the District Court of the United States for the
Northern District of Texas, Dallas Division

Civil Action No. 5255

JAMES H. REEVES and ISHAM P. NELSON,
JR., dba Reeves & Nelson,

vs.

A. E. STOKES, and Wife, ESTELLE STOKES

COMPLAINT ON ACCOUNT

Comes now James H. Reeves and Isham P. Nelson, Jr., dba Reeves & Nelson, Certified Public Accountants, plaintiffs, complaining of A. E. Stokes, and wife, Estelle Stokes, defendants, and for cause of action respectfully show as follows:

I.

That jurisdiction of this cause of action is founded on diversity of citizenship and amount in controversy. That plaintiffs are citizens of Dallas, Dallas County, Texas, and defendants are citizens of Sidney, Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars and no/100 (\$3,000.00).

II.

Defendants owe plaintiffs for professional services rendered to the defendants as Certified Public

(Testimony of James H. Reeves.)

Defendants' Exhibit No. 3—(Continued)

Accountants, Three Thousand Thirty-eight Dollars and Twenty-two cents (\$3,038.22) according to the account hereto annexed as Exhibit "A."

Wherefore, plaintiffs demand judgment against defendants, jointly and severally, for the sum of Three Thousand Thirty-eight Dollars and Twenty-two cents (\$3,038.22) and costs.

/s/ YALE B. GRIFFIS,
Attorney for Plaintiffs.

[Exhibit A attached to this complaint is identical to Plaintiffs' Exhibit No. 1.]

In the District Court of the United States for the
Northern District of Texas, Dallas Division

Civil Action No. 5255

JAMES H. REEVES and ISHAM P. NELSON,
JR., dba Reeves & Nelson,

vs.

A. E. STOKES, and Wife, ESTELLE STOKES

Comes now the plaintiffs by Yale B. Griffis, their attorney, and make application to this Honorable Court for Order of Service of Process outside the

(Testimony of James H. Reeves.)

Defendants' Exhibit No. 3—(Continued)

territorial limits from the State of Texas, and for an Order setting the date for defendants to answer plaintiffs' complaint, and aver in support thereof:

I.

Plaintiffs are residents of Dallas, Texas, and the amount of complaint exceeds Three Thousand Dollars (\$3,000.00).

II.

Defendants, A. E. Stokes, and wife, Estelle Stokes, are residents of Sidney, Montana, P.O. Box 272, telephone number 890, with last known address being the Lalonde Hotel.

Wherefore, it is prayed that this Honorable Court issue its Order directing that process in the above-styled matter be made by the U. S. Marshal at Sidney, Montana, or by the Sheriff or Deputy Sheriff at Sidney, Montana, and set a time within which defendants, and each of them, may answer plaintiffs' complaint herein.

Respectfully submitted,

/s/ YALE B. GRIFFIS,

Attorney for Plaintiffs.

(Testimony of James H. Reeves.)

Defendants' Exhibit No. 3—(Continued)

In the District Court of the United States for the
Northern District of Texas, Dallas Division

Civil Action No. 5255

JAMES H. REEVES and ISHAM P. NELSON,
JR., dba Reeves & Nelson,

vs.

A. E. STOKES, and Wife, ESTELLE STOKES

On the petition on file herein and the application of plaintiffs for an Order for Service of Process on defendants outside of territorial jurisdiction of the State of Texas, and for setting a time within which defendants may answer plaintiffs' complaint, it is Ordered:

I.

That service shall be made upon defendants and each of them by the U. S. Marshal, at Sidney, Montana, or by the Sheriff or Deputy Sheriff, at Sidney, Montana, by delivering to them for service copies of the summons and complaint herein, together with copies of plaintiffs' application and this order.

II.

That defendants and each of them shall have 30 days within which to answer plaintiffs' complaint or otherwise plea.

(Testimony of James H. Reeves.)

Defendants' Exhibit No. 3—(Continued)

WM. H. ATWELL,
U. S. District Judge.

Dated at Dallas, Texas, this 14th day of August,
1953.

Received in evidence December 5, 1955.

Mr. Dugan: Your Honor, my previous objection goes to this document and the receipt of it?

The Court: Certainly.

Mr. Dugan: I haven't had an opportunity to examine it before you made your ruling.

The Court: Take your time.

Mr. Dugan: Very well, I examined it, your Honor.

Mr. Wood: Just a few more questions, Mr. Reeves.

Q. Did I understand you to say that you went to the home of Mr. Stokes in April, 1952, and made a deal, was that right? [32] A. Yes, sir.

Q. And what was the character of the deal that you say was made then?

A. The deal that was made, sir, was that he asked me how much money I would charge him for the work and I told him that I could not foresee to the dollar how much money it would cost him but that records ordinarily in pretty good shape would cost around \$300 a year and he had 7 years for re-

(Testimony of James H. Reeves.)

turns that had not been filed, as well as the current year was also concerned, and I estimated around \$300 per year for the work.

Q. Now, that is the deal you say was made at that time? A. That is right.

Q. You still say there was no deal made September 9, 1952? A. Positively not, sir.

Q. Referring you to Defendants' Exhibit No. 3 and after that Texas suit was brought and the papers were served, Mr. Stokes came down to see you? A. Yes.

Q. As a matter of fact he was then living in Sidney, Montana?

A. I believe that is right, sir; I am not sure.

Q. And he came down and saw you at Dallas?

A. Yes, sir. [33]

Q. And didn't you at that time discuss with him and he discuss with you the matter of your account for services?

A. Yes, sir. What he said was——

Q. I am asking you if he did or did not?

A. Yes; we did.

Q. And did he have anything whatever to say about the account being excessive or exorbitant or not in accordance with the arrangement?

A. No, sir.

Q. Said nothing at all? A. No, sir.

Q. And later when this suit was disposed of in Texas and along in either November or December of 1953 did you have any telephone talk with Mr. Stokes regarding your account and the obligation involved, if any?

(Testimony of James H. Reeves.)

Mr. Dugan: I object to that as indefinite as to time.

Q. I said either November or December, 1953?

Mr. Dugan: I object to that as including a period after the filing of the lawsuit.

Mr. Wood: No, it was not; this lawsuit was filed in the end of December, 1953.

The Court: I will permit him to answer the question.

A. Well, I don't believe I can, actually I don't know.

Q. You don't remember? [34]

A. I don't recall.

Q. Didn't you call him yourself in Sidney to talk to him about this matter?

A. It is entirely possible, I may have.

Q. But you can't remember it now?

A. I couldn't pinpoint it that close.

Q. Didn't make any impression upon you, is that what you are telling me?

A. As to that, sir, my memory is just not complete.

Mr. Wood: All right, that is all I wanted to know about it. That is all.

(Testimony of James H. Reeves.)

Redirect Examination

By Mr. Dugan:

Q. In your examination just now, Mr. Reeves, you have been asked whether you had had any contact whatsoever with Mrs. Stokes and you said that you had never seen her before, just talked to her on the telephone? A. Yes, sir.

Q. On several occasions?

A. No; just on one occasion.

Q. When was that?

A. That was in, I believe it was March of 1955.

Q. Prior to that time; that was after the suit was filed? [35] A. Yes.

Q. Have you talked with her any time prior to, had you talked to her at any time prior to filing suit, in for example, calling for Mr. Stokes, did you speak to her on the telephone?

A. She may have answered the telephone but I never talked to her; he transacted the business.

Q. He transacted the business?

A. Yes, sir.

Q. Now, this check which I haven't seen yet but which was furnished—may I see it?

Mr. Wood: Yes; it hasn't been put in evidence yet.

Q. (By Mr. Dugan:) The check which is marked Defendants' Exhibit 2, not yet offered in evidence, was actually presented to you by Mr. Stokes?

A. Yes.

(Testimony of James H. Reeves.)

Q. But bore her signature on the account in question it was drawn against? A. Yes, sir.

Q. And purported to be payment on the account in question?

Mr. Wood: What purported to be?

Q. The check in payment purported to be payment was presented to you as purported payment of the account due you? [36]

A. It certainly was.

Mr. Wood: I thought you were going to say the check itself purported to.

Mr. Dugan: No.

Q. Included among the records you prepared in the form of income tax returns were returns for Mrs. Estelle Stokes, were there? A. Yes.

Q. Those were individual returns or joint returns?

A. They were community returns prepared for Mr. and Mrs. Stokes for the calendar years 1951 and 1952.

Q. Did they include income of Mrs. Stokes?

A. Yes.

Q. Included in the records, for example, were there records of the transactions performed or accomplished by Mrs. Stokes? A. Yes.

Q. Now you mentioned in a conversation with Mr. Stokes that you had given him an estimate of what your services might run, would you indicate to this court what basis you made that estimate on?

A. Yes, I believe I did that by a study for

(Testimony of James H. Reeves.)

small businesses. It would cost about \$300 a year if they were in good shape.

Q. Were these records of the type you used to serve as [37] a basis for your estimate?

A. No, they certainly weren't.

Q. Of far greater difficulty, were they?

Mr. Wood: We object to these questions as leading and suggestive.

Mr. Dugan: They are leading. I admit.

The Court: They are leading all right and suggestive.

Mr. Wood: I will stand for a certain amount of it but I am not going to stand for any more.

Q. (By Mr. Dugan): Mr. Reeves, did the difficulty of the work which you actually did, and the difficulty of the work which you were estimating, how would you say those two compared?

Q. Well, there would be no comparison because actually everything for the 7 years' work was just pitched together in 5 or 6 boxes and no particular sequence to find material and so forth.

Q. And which would you say that was of great difficulty than that you were talking about in an estimate? A. It certainly was.

Mr. Wood: That is objected to as improper re-direct examination.

The Court: Yes, I think so; we will have to sustain the objection there. [38]

Q. (By Mr. Dugan): There has been introduced in evidence here Defendant's Exhibit 3 purporting to be certified copies of a suit filed by your

(Testimony of James H. Reeves.)

firm against the defendants in the State of Texas. Are the papers constituting Defendant's Exhibit No. 3 complete with respect to the, all of the papers in the action or are there other papers which are missing particularly the answer or appearance of the defendants and the orders made in connection with the matter?

Mr. Wood: Objected to as immaterial and not proper redirect examination.

The Court: Well I think he may ask him in regard to them, whether all the papers are there; if the exhibit is material at all why then that question would be material.

A. To the best of my knowledge the papers are here.

Q. You are not a lawyer, are you?

A. No, sir; I am not.

Q. In thumbing through here do you see any order made by the court with respect to disposition of the case? A. No.

Mr. Wood: That is objected to because the document speaks for itself.

The Court: Yes.

Q. (By Mr. Dugan): Do you know whether any order was entered in the case? [39]

Mr. Wood: That is objected to as immaterial and not proper redirect.

The Court: You brought that out on your cross-examination; you may inquire as to that.

Q. Was there such an order entered in the case?

The Court: If you know.

(Testimony of James H. Reeves.)

A. Yes, that is, to say, I was told by my attorney the case was dismissed, Mr. Dugan, would be the best knowledge I have.

Mr. Wood: That is purely hearsay.

The Court: What did you say further?

A. I said my attorney in Dallas, Texas, told me the case had been dismissed.

Q. (By Mr. Dugan): Was it dismissed on your attorney's motion do you know? A. No, sir.

The Court: Well all right, let it stand.

Mr. Wood: Yes, I don't care.

Q. (By Mr. Dugan): Do you know whether an answer was filed in that case? Now, by an answer we mean an appearance in which the specific allegations of the complaint are answered and denied or admitted or other allegations such as was done here and I read from in the opening [40] statement? A. Yes, sir; I saw the answer.

Q. Was it an answer or appearance to take the case out of the jurisdiction of the court?

Mr. Wood: This is all objected to as not only irrelevant but immaterial.

The Court: You are talking about some documents that may or may not have been filed in the case; I will sustain the objection; if they are material at all, they should be here with the rest of the documents.

Mr. Dugan: Very well.

Q. (By Mr. Dugan): I believe you said in your

(Testimony of James H. Reeves.)

direct examination that you presented a statement of account to the defendants in April of 1953?

A. That is right, sir.

Q. And that was immediately upon completion of the work? A. Yes, sir.

Q. And you presented it personally to Mr. Stokes?

A. I handed it to Mr. Stokes in my office.

Q. Did you retain a copy of that statement?

A. Yes, sir.

Q. An exact carbon copy is yet in your possession? A. Yes, sir.

Mr. Dugan: I will call upon the defendants to produce the statement dated April 3, 1953, bearing the same [41] invoice number as the original invoice personally presented to the defendant.

Mr. Wood: We have nothing of the sort.

Q. I hand you as marked Plaintiff's Exhibit No. 4 and ask you to state what that is?

A. This is a copy of the Reeves-Nelson invoice 2066, dated April 3, 1953, to Mr. A. E. Stokes, P. O. Box 276, Sidney, Montana, in the amount of—

Q. Just a minute, is this instrument—is it a carbon copy of the statement? A. Yes, sir.

Q. And it is an exact copy? A. Yes, sir.

Q. Before we introduce it tell me how it differs from the statement which you have offered in evidence as Plaintiff's Exhibit No. 1.

A. This statement does not include the telephone charges which I should have rendered Mr. and Mrs. Stokes at the time.

(Testimony of James H. Reeves.)

Q. Was any objection made at any time, ever made by Mr. Stokes in writing or otherwise to this document? A. No, sir.

Q. Or to the amount of this document?

A. No, sir.

Mr. Dugan: Subject to objection by defendants' attorneys we offer in evidence Plaintiff's Exhibit 4 by way [42] of background as the duplicate to the other statement.

Mr. Wood: It is objected to as immaterial for any purpose and is not proper redirect examination in any event.

The Court: I will admit it from your examination; I heard the answers and it will be admitted in evidence.

Plaintiff's Exhibit No. 4

Civil Case No. 1570, James H. Reeves, et al., vs.
A. E. Stokes, et al.

April 3, 1953.

2066

Mr. A. E. Stokes,
P. O. Box 276,
Sidney, Montana.

Per Detail Attached: \$2,627.50

Mr. A. E. Stokes

Analysis and examination of books and records of account, and miscellaneous data required for

filing U. S. tax returns for Mr. and Mrs. A. E. Stokes for the years 1946, 1947, 1948, 1949, 1950, 1951 and 1952; for Allied Lumber Company for the years 1946, 1947 and 1948, and for Air Base City for the year 1949.

Conferences in connection with the above.

| | |
|---|-----------|
| James H. Reeves, C.P.A., 28 days at \$35.00 per diem | \$ 980.00 |
|---|-----------|

| | |
|---|----------|
| Isham P. Nelson, Jr., C.P.A., 42½ days at \$35.00 per diem | 1,417.50 |
|---|----------|

| | |
|--|--------|
| B. B. Wright, C.P.A., 16 days at \$30.00 per diem | 480.00 |
|--|--------|

\$2,877.50

| | |
|--------------------|--------|
| Less Payment | 250.00 |
|--------------------|--------|

| | |
|------------|--------------------------|
| Total..... | <u><u>\$2,627.50</u></u> |
|------------|--------------------------|

Received in evidence December 5, 1955.

The Court: Leave the exhibit with the clerk.

Mr. Dugan: Yes, your Honor.

The Court: That is all.

Recross-Examination

By Mr. Wood:

Q. I merely want to refer back to the exhibit attached to the complaint in this action, Mr. Reeves, and by that I mean what is referred to as Exhibit A attached to the complaint in this action here.

The Court: What is the exhibit you have in your hand?

Mr. Wood: This is Exhibit A attached to the complaint in this action in this court.

The Court: Yes.

Q. (By Mr. Wood): And there is listed there, is there not, item 10, U. S. Individual Income Tax Return for Estelle Stokes, and item 12, 1952 U. S. Individual Income Tax Return for Estelle Stokes, together with extension granted to June 15, [43] 1953. Now as to the extent only of those items that anything was done for Mrs. Stokes, am I correct about that?

A. Mrs. Stokes never asked me to do anything for her.

Q. I am asking you if it was to that extent only anything was done for Mrs. Stokes by your office?

A. Yes, that is right.

Mr. Wood: That is all I want to know. No further examination.

Mr. Dugan: Plaintiff rests.

The Court. Do you want to make a statement for the record, a brief one?

Mr. Wood: No, your Honor, I see no reason for it.

The Court: You may proceed.

MRS. ESTELLE STOKES

was called as a witness and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wood:

Q. Will you state your name, please?

A. Estelle Stokes.

Q. And you are one of the defendants in this lawsuit? A. That is right. [44]

Q. You are the wife, are you not, of Mr. A. E. Stokes, the other defendant? A. Yes, sir.

Q. You were married when, you and Mr. Stokes? A. August 11, 1951.

Q. I am asking you to refer to a document marked Defendant's Exhibit No. 2, Mrs. Stokes, and I will ask you whether you have seen that document before? A. Yes, sir.

Q. And it is signed, is it not, Estelle Parker, Special Agent?

A. Estelle Parker, Special Agent.

Q. And who was Estelle Parker?

A. I was Estelle Parker previous to my marriage to Mr. Stokes.

Q. And this document Defendant's Exhibit 2 is dated February 9, 1952, is it not?

Mr. Dugan: I object to the detailing of all of

(Testimony of Estelle Stokes.)

the evidence set forth in the document without including it in evidence.

Q. I am going to introduce it in evidence. I am asking her if it isn't dated that way?

A. Yes, sir.

Q. And as a matter of fact what was the condition of the defendant's exhibit as and when you turned that document [45] over to anybody else insofar as to whom it is payable is concerned and the amount?

A. To my husband, Mr. Stokes.

Q. It was turned over to him?

A. It was a blank check signed by me.

Q. Signed by you? A. Yes.

Q. And you were still carrying on although you were married to Mr. Stokes you were still carrying on your bank account as Estelle Parker?

A. I still had my bank account as Estelle Parker.

Q. Now was this document delivered by you to anybody when it was signed by you as Estelle Parker, special account, was it delivered by you to anybody?

A. To my husband.

Q. And when was it delivered to him?

A. September 9th, 8 or 9th, 9th.

Q. Of what year? A. '52.

Q. And what was the purpose in delivering that blank check except for your name to him?

A. Well, he was going down to Dallas from Oklahoma City, our home.

Q. You were living then in Oklahoma City?

(Testimony of Estelle Stokes.)

A. That is right. [46]

Q. And to make arrangements with Mr. Reeves on the returns he was making? A. Yes.

Q. And the Mr. Reeves you refer to is the gentleman who testified previously in this lawsuit?

A. That is right.

Q. And what was the purpose in giving the document to Mr. Stokes?

Mr. Dugan: Now we object to this as calling for an opinion, and as being irrelevant and immaterial what the purpose was behind these things; the check speaks for itself and is the best evidence.

The Court: Well I think she may state why she gave it to her husband.

Q. (By Mr. Wood): You may say why you gave it to your husband?

A. To pay my part of the income tax returns that Mr. Reeves was preparing for me for the two years 1951 and 1952.

Q. And what authority if any did you give to Mr. Stokes with respect to filling in the amounts for which the check was to be issued for?

A. I told him to fill in the amount for the two years after he talked with Mr. Reeves and had decided upon a definite charge that was to be made for the returns.

Q. Now whose writing is on the face of this check, [47] Defendant's Exhibit No. 2?

A. Mr. Stokes made the check out himself; I signed it; it was blank.

(Testimony of Estelle Stokes.)

Q. Did he make that out in your presence or elsewhere?

A. No, he didn't make it in my presence; I gave it to him before he left home, a blank check.

Q. Before he left home to go to Dallas to see Mr. Reeves, is that correct? A. That is right.

Q. Now still referring to Defendant's Exhibit 2 did that pass through your bank account ultimately, may I ask?

A. Yes, sir; Liberty National Bank, Oklahoma City.

Mr. Wood: We now offer in evidence Defendant's Exhibit No. 2. You want to see it? I guess you haven't seen it.

Mr. Dugan: I haven't seen it.

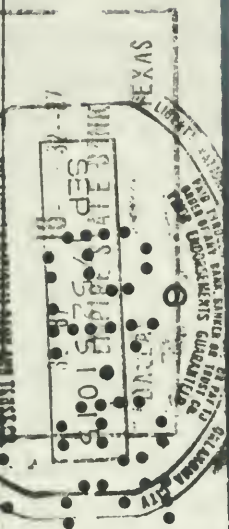
Mr. Dugan: No objection.

The Court: It may be received in evidence.

16 1957

32-61
MERCANTILE
PAY TO THE ORDER
BANK OR BANKER
OR CLEARER THROUGH
DALLAS CLEARING HOUSE
PRIOR ENGAGEMENT
GUARANTEED

2 E. Stokes
Reagan + Jackson



Reagan + Jackson

Case 1570

Pay to the order of *Estelle Parker* No. **569**

Q. E. Stokes *9-9* *1952* *39.19*
OKLAHOMA CITY, OKLA. *1030*

Five Hundred and Fifty & no *250 50*
DOLLARS

The Liberty National Bank & Trust Co.
Oklahoma City, Oklahoma

Estelle Parker
Deputy Acct.

Received in evidence December 5, 1955.

(Testimony of Estelle Stokes.)

Q. (By Mr. Wood): Now will you state, Mrs. Stokes, or perhaps you have already done so, whether you knew Mr. Reeves at all?

A. No, I did not.

Q. As a matter of fact have you ever had any contact with Mr. Reeves or Mr. Nelson, any personal contact?

A. No, sir; I have not. [48]

Q. What if any arrangement did you ever make directly or indirectly with respect to the account sued upon in this lawsuit?

A. Nothing personally with them.

Q. Then if I may repeat what you have said by way of answer the only contact you have had with Mr. Reeves was indirectly and this check Defendant's Exhibit No. 2, is that right?

A. That is right, sir.

Q. And you have had no contact with him or his firm either previously or since?

A. No, sir.

Q. And the items for which the check was given to Mr. Stokes are covered, are they not, by the exhibit attached to the complaint in this lawsuit in the items numbered 10 and 12?

Mr. Dugan: I object to this likewise in counsel's words as both leading and suggestive and argumentative and repetitious.

The Court: Yes, but he can inquire whether having seen that account attached to the complaint she knew at the time what the charges were against her and if that check was intended to pay that account.

Q. And to be specific in complying with the sug-

(Testimony of Estelle Stokes.)

gestion and request of the court what items if any on this exhibit A [49] were to be paid by the check that you gave Mr. Stokes?

Mr. Dugan: Your Honor, I object to that as repetitious and calling for a conclusion of the witness with respect to hearsay statement between herself and her husband.

The Court: What accounts, if any, or items on that exhibit, if any, was the check intended to cover? She may answer that.

A. The 1951 and 1952, I believe that is 10 and 12; without my glasses.

Q. (By Mr. Wood): Do you need glasses?

A. 1951 and 1952.

Q. Items 10 and 12 of this Exhibit A attached to the complaint? A. That is right.

Q. Do you know whether there were any telephone contacts between Mr. Reeves and Mr. Stokes with respect to any of the matters in litigation here, were there any telephone conversations that you know took place and what was said and the conversation?

Mr. Dugan: I object to that as being indefinite as to time and without any indication this witness is qualified to speak.

Mr. Wood: I am asking if she does know whether [50] there were any telephone conversations.

The Court: At that time you are referring to?

Mr. Wood: Very well, if you want specific time.

Q. Mrs. Stokes, in the fall of 1953 do you know

(Testimony of Estelle Stokes.)

whether there were any telephone conversations between Mrs. Stokes and Mr. Reeves?

A. Yes, I recall one when we were in Sidney, Montana.

Q. When about?

A. I would say around the first of December, from the first to the tenth. I know it was after the first of December.

Mr. Dugan: May I ask a question on voir dire?

Q. Could it have been as late as the first of January, 1954?

A. No, it was just shortly after December 1st.

Mr. Dugan: Very well.

Q. (By Mr. Wood): Well to be more specific was it before this particular lawsuit was brought here in Billings? A. Yes, it was.

Q. You don't know of course what was said over the telephone between the two parties?

A. No, sir; I do not.

Q. You simply know there was a telephone conversation between them? [51]

A. That is right.

Q. Now as a matter of fact and I will put it this way, what about Mr. Stokes' physical condition during 1955?

Mr. Dugan: I object to that as irrelevant and immaterial.

Mr. Wood: I would like to have the court know there has been a reason for some of the motions made in the past to continue the case.

The Court: Well, yes, there is a record es-

(Testimony of Estelle Stokes.)

tablished here of a delay and which appeared to be an unnecessary delay perhaps from your standpoint and I will let him show.

Q. (By Mr. Wood): I wish you would please tell the court and counsel what occurred if anything to Mr. Stokes in 1955 that affected his physical condition?

A. On March 10th of this year he was in a gas well explosion, he had a decompressed skull fracture that necessitated brain surgery and the part of the skull that was removed could not be replaced and his head now as far as the skull is all tender and open and he is subject to blindness at times and he was in the hospital for some time and is now recuperating.

Q. What, if anything, could he do with respect to his work from April on?

A. Anything that has been done recently I have had to [52] be with him on doctor's orders at all times.

Q. In other words, he has been incapacitated, is that right, until quite recently?

A. That is right.

Q. And now he is commencing to recover, is that right?

A. Yes, sir.

Mr. Wood: That is all.

(Testimony of Estelle Stokes.)

Cross-Examination

By Mr. Dugan:

Q. You at no time discussed with the plaintiffs in this case the amount that this statement, that the charge was to be for your part of the statement as you said?

A. Not personally to Mr. Reeves.

Q. You never made any arrangements with them that your part should be limited to any amount?

A. I have not talked with Mr. Reeves regarding it.

Q. To take care of that arrangement you say that you gave your husband a check in blank and authorized him to go to the office of Reeves and Nelson and ascertain the amount and fill it in, is that correct?

A. That is right.

Q. The preparation of the income tax returns partly including those two years involving your income were done with [53] your authority given to Mr. Stokes, were they not?

A. Yes.

Q. In other words, you made no objection to the turning over of this information to Reeves and Nelson to be prepared and filed for you?

A. No, I didn't.

Q. You were personally not concerned with that?

A. Yes.

Q. And you during the period from the time of your marriage in August, 1951, until the time of the actual filing of these returns were living

(Testimony of Estelle Stokes.)

with your husband as husband and wife, were you not? A. That is right.

Q. And were vitally affected by his getting his returns filed, were you not?

Mr. Wood: That is objected to as immaterial.

The Court: Getting whose returns filed?

Q. All of these returns filed, were you not?

Mr. Wood: Objected to as irrelevant.

Q. (By Mr. Dugan): I will ask you whether you were dependent upon your husband during those years for your livelihood?

Mr. Wood: That is objected to as irrelevant and immaterial.

The Court: Yes, I think so; I will sustain the objection [54] on this line of examination.

Q. This Defendant's Exhibit No. 2, are you familiar with how to determine when the check has actually reached your bank by the perforation holes? I wonder if you would hold that up to the light and ascertain when it was actually paid by the bank?

Mr. Wood: Do you need your glasses? You say you don't need them?

A. September 17th, 1952, if I can see correct.

Q. I see, thank you. Did you place the telephone call in December, 1953, to Mr. Reeves or Mr. Nelson? A. Me?

Q. You. A. I did not.

Q. You only know it from what your husband told you to whom he purported to be talking?

A. That is right.

(Testimony of Estelle Stokes.)

Q. It could have been anyone else, could it not?

A. No, I don't think so; he said Mr. Reeves.

Q. Were you on the line? A. No, I was not.

Q. He said Mr. Reeves? A. That is right.

Mr. Dugan: Your Honor, may we have about a five minute recess? [55]

The Court: Yes, we will take a recess for 10 minutes.

(11:30 a.m.)

(Court resumed, pursuant to recess, at 11:50 a.m., at which time all parties and counsel were present.)

The Court: You may proceed.

Mr. Dugan: Mrs. Stokes, would you take the stand again, please.

MRS. ESTELLE STOKES

resumed the stand and testified as follows:

Direct Examination

(Continued)

By Mr. Dugan:

Q. I think you said that this telephone conversation that you had in December, that was from Sidney, Montana? A. That is right.

Q. You were living at Sidney then?

A. Yes.

Q. In December, 1953? A. That is right.

Q. And were you living in Sidney in July, 1953?

(Testimony of Estelle Stokes.)

A. Yes, we were.

Q. Where were you living then—by you I mean both you and your husband?

A. I am not sure whether we were in the Lalonde Hotel.

Q. The Acadia?

A. We had moved to the apartment then I believe at that [56] time. I am really not sure of that date.

Q. In Sidney? A. Yes.

Q. During the month of July, 1953, were you at home in your apartment there in Sidney the greater part of the time? A. Yes, sir; I was.

Q. Do you recall receiving through the mail a document of which this would be a copy, Plaintiff's Exhibit No. 1, do you recall seeing that there?

A. No, sir; I do not.

Q. Post Office Box 276, that was your box of your post office in Sidney, was it? A. No.

Q. What was? A. 272.

Q. Did you receive other mail, do you recall receiving other mail from Reeves and Nelson about that time or the months previous?

A. I don't because the mail was not to me and I just don't recall having received any.

Q. If it was from Reeves and Nelson you turned it over to your husband? A. That is right.

Q. In November of 1954 and January of this year you have been living in Wichita, Kansas? [57]

A. That is right.

Q. What is the address at which you have been

(Testimony of Estelle Stokes.)

living? A. 524 North Fountain.

Q. 524 North Fountain and that was in the months of November and December last past?

A. No, we moved to Wichita, Kansas.

Q. In May of 1953 was it or thereabout?

A. We moved to Wichita, Kansas, in November of 1954.

Q. November of 1954? A. I am sorry.

Q. And been residing at that address 524 North Fountain? A. That is right.

Q. You received mail there, did you?

A. Yes, sir.

Q. I hand you an exhibit marked Plaintiff's Exhibit No. 5 and ask you to state what that is?

A. It is a letter to Mr. A. E. Stokes, Wichita, Kansas.

Q. To what address was it directed?

A. The address is marked out.

Q. What was it before it was marked out, it is observable, is it not?

A. I can't tell what it is marked out.

Q. Hold it up closer and see if you can't read through that. A. I sure can't. I am sorry. [58]

Q. You can't read that? A. No.

Q. Can you read there 524 North Fountain?

A. I can't read that close.

Q. Do you read 524 North Fountain?

A. It looks like a 5 here but the other is—the first does look like a 4 or 5.

Q. From what part is this envelope directed?

(Testimony of Estelle Stokes.)

A. Wood, Cooke and Moulton.

Q. And can you read the year and date stamped; in other words, the cancellation stamp?

Mr. Wood: We object to all of this, if the court please, as wholly irrelevant for any purpose and immaterial.

Mr. Dugan: It is just going to the same matter about his condition.

The Court: Who is it addressed to?

A. Mr. A. E. Stokes.

The Court: Do you know anything about it?

A. No, sir, I do not.

The Court: Well that is enough; she doesn't know anything about it. Ask her if she knows anything about that.

Q. (By Mr. Dugan): I hand you Plaintiff's Exhibit 6 and ask you to state what that is. [59]

A. It is a letter addressed to Mr. A. E. Stokes.

Q. To what address?

A. 524 North Fountain Avenue.

Q. And when is it postmarked if it is postmarked?

Mr. Wood: If the court please, this document will speak for itself and this examination is immaterial.

The Court: It is not addressed to her?

Mr. Wood: It isn't even addressed to her.

Q. (By Mr. Dugan): We just want to find out whether she saw it or received it.

A. No, sir; I did not.

(Testimony of Estelle Stokes.)

Q. Did you still open mail when you were living at 524 North Fountain?

A. Addressed to me, yes.

Q. Was there other mail received you turned over to Mr. Stokes at that address?

A. I did not open any of his mail.

Q. Well was other mail received that you turned over to him?

A. Well his mail went to his Post Office box.

Q. So if it was addressed to 524 North Fountain, would you refuse it? A. Oh, no.

Q. If it was addressed to him? [60]

A. No.

Mr. Dugan: Your witness.

The Court: Is that all?

Mr. Dugan: That is all.

Mr. Wood: No further examination.

The Court: Well we will take a recess until two o'clock this afternoon.

(12:00 noon.)

(Court resumed, pursuant to noon recess, at 2:15 p.m. on December 5, 1955, at which time all parties and counsel were present.)

The Court: All right, gentlemen, you may proceed.

Mr. Wood: The record shows, does it not, that the plaintiff has rested?

Mr. Dugan: Yes. You introduced your first witness.

Mr. Wood: Yes, I knew that but I wanted to be sure the record showed the plaintiffs rested.

Mr. Wood: Mr. A. E. Stokes.

A. E. STOKES

plaintiff, took the stand and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. And as a matter of fact, Mr. Stokes, your hearing [61] has been impaired to a certain extent as a result of your injuries, is that right?

A. It still has.

Q. You are one of the defendants in this lawsuit, are you not? A. Yes, sir.

Q. And you are Mr. A. E. Stokes?

A. Yes, sir.

Q. And Estelle Stokes who testified earlier is your wife, is she not and she is the other defendant?

A. Yes.

Q. And when were you married to Mrs. Stokes?

A. August 11, 1951.

Q. 1951? A. Yes.

Q. You were present in the courtroom here, were you not, this morning when Mr. Reeves testified?

A. I was.

Q. You heard what he had to say? A. Yes.

Q. If I am not mistaken and I don't think that I am he said in substance in answer to some questions that he went to your home in April, 1952, and made a deal, did you hear that testimony?

(Testimony of A. E. Stokes.)

A. I did. [62]

Q. And that is what he said, is it not?

A. Yes.

Mr. Dugan: Now we object that the record speaks for itself in that respect.

Q. (By Mr. Wood): Mr. Stokes, will you please state whether Mr. Reeves was correct in that testimony or mistaken? A. He was mistaken.

Mr. Dugan: I object to that as calling for a conclusion of the witness, improper examination.

The Court: What was your objection?

Mr. Dugan: Your Honor, that it calls for a conclusion and improper reference to other testimony other than being the testimony of this witness.

Q. (By Mr. Wood): I am referring to the particular testimony mentioned with respect to the April, 1952, meeting; I am asking you whether—

The Court: Whether there was such a meeting?

Q. Whether there was such a meeting at that time.

Mr. Dugan: My point is this, he is asking this witness characterize whether the testimony of the plaintiff, one of the plaintiffs, is correct. It might be he believes there might be discrepancy in some particular point, and I do not want the defendant to answer that question by saying [63] it is not correct.

Q. (By Mr. Wood): I was asking whether that meeting occurred or not? A. It did not.

Q. It did not occur? A. No, sir.

(Testimony of A. E. Stokes.)

Q. Was there a meeting between you and Mr. Reeves at any time for the purpose of making a deal either in the spring of 1951 or in the spring of 1952? A. Not in the spring, no.

Q. Then did you have any meeting with Mr. Reeves, we will say then, in the spring of 1952?

A. Yes.

Q. And what was that for?

A. I was giving him additional books and ledgers and information that he had requested.

Q. And when did you give him any other information, books, records or anything of that sort, if you did give him any?

A. In the summer of 1951.

Q. Summer of 1951, but there was no meeting then in April of 1952? A. No.

Q. And did you at both your 1951 and 1952 meetings supply Mr. Reeves with all of the data that he requested? [64] A. I did.

Q. And what did that data consist of?

A. Ledgers, bank statements, cancelled checks, invoices and complete record brought down by my regularly employed bookkeeper.

Q. Did you either in the 1951 or spring of 1952 make any deal so-called with Mr. Reeves with respect to the work he was doing? A. I did not.

Q. When if at all, Mr. Reeves, did you make, or Mr. Stokes, did you make any deal with Mr. Reeves for service by him in connection with tax matters, when? A. September 9, 1952.

Q. And where was that deal made?

(Testimony of A. E. Stokes.)

A. In his office at Dallas, Texas.

Q. And who was present?

A. He was present.

Q. And you? A. Yes.

Q. Nobody else?

A. No. I called in Mr. Isham Nelson later, but he and I discussed it and arranged our deal what he was to charge and what it was to cover and the total charges and all was arranged then between he and I, and I told him at the time——

Mr. Dugan: I object, the last part of that [65] is not responsive to the question, which is what was the deal, and now he is telling as to what was told him on a particular time rather than being the agreement of the parties.

The Court: That might have been part of the deal.

A. It was a discussion between Mr. Reeves and I.

Q. (By Mr. Wood): Well, now be more specific. Will you please state to the court what transpired, if anything, with respect to a deal at the meeting at Dallas, Texas, upon September 9th, 1952?

A. Mr. Reeves had ample time to go over the data and all and arrived at the time it would take for him to put it in the form of a return, tax return, and file it, and he——

Q. May I break in for just a minute before you answer further and then you can go on with that. You are now referring to the items that are listed

(Testimony of A. E. Stokes.)

in this action that has been brought in this court against you?

A. Yes, it was income tax returns for 1946, 1947, 1948, 1949, 1950 and 1951, and to complete the 1952 returns.

Q. Now then, will you please go on and continue your answer to my previous question as to what transpired between you and Mr. Reeves in your September 9th, 1952, meeting with respect to the making of the deal?

A. I told him I would like for him to do the work and all, and I said: "Jim, what are you charging me to complete [66] all the work, all charges and everything? You know I have been critically injured and I have had some big financial reverses, but I will pay you; you can ask anybody about me and I will pay you." He says: "I am your friend and I understand you had a rough time." He says: "We will complete all work, all charges for \$250 per year, regardless of what was done each year we will average it out \$250 a year."

Q. How many years did you say were involved?

A. Well, it would make 7 years or \$1750, and I said: "Well, Mrs. Stokes wants to pay her part right now and all and get hers clear." I said: "You know I can't pay you now, but I will pay you when I can." Which was agreeable.

Q. By the way, did he agree or not agree?

A. He agreed to do it on that basis, \$250 per year for all charges.

Q. For all charges, is that what you said?

(Testimony of A. E. Stokes.)

A. Yes.

Q. Did he then determine or was it determined what Mrs. Stokes should pay for her part?

A. Yes.

Q. How much was it?

A. There was two years' service would be for us both would be \$500, and he said her part would be \$250 and that would settle hers completely in full. [67]

Q. Was that satisfactory to you, did you agree that was the proper arrangement?

A. Yes, half was hers and half was mine and that was satisfactory with me.

Q. Now as to the entire charge was that agreed to by you? A. Yes.

Q. And also agreed to by him?

A. Yes, sir.

Q. And everybody else sitting in on the conference regarding the charges?

A. Well, he and I were the only ones that sat in, but he called in Mr. Nelson after he and I agreed on that and said: "Nelson, is that okay with you?"

Q. Who was Mr. Nelson?

A. That was a partner in this suit brought against me and my wife.

Q. The pending suit in this court?

A. Yes.

Q. In other words, a partner of Mr. Reeves?

A. Yes.

Q. What did Mr. Reeves have to say?

(Testimony of A. E. Stokes.)

A. Mr. Reeves explained to Mr. Nelson the agreement that he and I had arrived at and Mr. Reeves asked Mr. Nelson if that was okay by him and Mr. Nelson said yes, for him to [68] go ahead and handle it.

Q. Was that the extent of the participation by Mr. Nelson in this conference regarding charges to be made? Was that the extent of his participation?

A. Yes, sir.

Q. In other words, he then left the meeting?

A. He left the meeting.

Q. And what if anything was discussed between you and Mr. Reeves or was that all of it?

A. That was all of it and they agreed to complete the work through 1952 for the total charges of \$250 per year.

Q. For 7 years?

A. Yes, or \$1750 and Mrs. Stokes paid hers which was regarded her part.

Q. And you said Mrs. Stokes paid hers, her part, how was it paid?

A. By check on her personal account.

Q. I hand you herewith a document marked for identification Defendants' Exhibit No. 2 and will ask you to look at it if you will, please, and can you see all those dates? A. Yes, sir.

Q. And is that the check that was given at the time? A. It is.

Q. Now, Mr. Stokes, was this the check you had with you at Dallas, Texas, and when you saw Mr. Reeves? [69]

(Testimony of A. E. Stokes.)

Mr. Dugan: I object to that on the ground that assumes facts not in the evidence from this witness; he said she paid this check.

Mr. Wood: She what?

Mr. Dugan: She paid this check.

Mr. Wood: Here is the check with her signature on it.

Q. In other words, was this check filled out when you had it in your pocket there at Dallas and talked with Mr. Reeves and was there on it only the maker's name?

A. It was blank check signed by my wife and that is my own handwriting. I dated it September 9th, 1952, and showed it under special account or drawing account for her personal business.

Q. You filled it in?

A. I filled it in with my own fountain pen and handwriting.

Q. And then what did you do so far as the pen is concerned?

A. I endorsed it and handed it to Mr. Reeves.

Q. Do you recognize the other endorsement on this check, Defendants' Exhibit 2?

A. Yes, I recognize his signature.

Q. Whose signature?

A. Reeves, James Reeves.

Q. So that is that endorsement other than yours on it?

A. It says Reeves and Nelson. [70]

Q. But you recognize that as his handwriting?

A. Yes.

(Testimony of A. E. Stokes.)

Q. And this check, Defendants' Exhibit 2, went through the bank and was cashed, was it not?

A. It certainly was and paid as agreed.

Q. What if anything was said in this conference there in the September 9, 1952, meeting with Mr. Reeves about any other items if there were any that you were to pay?

A. There was no additional items or anything to be added, that was the total charges for him to complete through 1952 tax service for me and my wife.

Q. What if anything was said about telephone calls?

A. Everything was included in the \$250 per year price, no interest, nothing; that was total charges for me.

Q. Then if I understand you correctly the total of the 7 years was \$1750 and \$250 indicating balance left of \$1500?

A. Yes, that I was to pay myself.

Q. Do you concede there is that liability of yours unpaid?

A. I do concede that and always have conceded that and will pay that as soon as I am financially able.

Q. In September, 1952, where were you living?

A. Oklahoma City, Oklahoma.

Q. And how long did you stay there? [71]

A. Until April 4th, 1953.

Q. Then where did you go?

A. Sidney, Montana.

(Testimony of A. E. Stokes.)

Q. And you were there for some little time?

A. Yes.

Q. Now after this September 9, 1952, meeting did you have any further conference as such with Mr. Reeves regarding any obligation that you incurred for his work? A. I did not.

Q. Not at all? A. No, sir.

Q. Well then did you discuss the matter of this account with him at any time subsequent to September 9, 1952?

A. State your question again.

Q. Did you have any talk with Mr. Reeves subsequent to September 9, 1952, regarding this account? A. I did not.

Q. Did you or did you not meet him sometime in 1953? A. I did.

Q. That is what I am talking about.

A. I misunderstood your statement.

Q. What occurred in August, 1953, so far as Mr. Reeves is concerned?

A. I went to Dallas, Texas, on September 4, 1953, to see Mr. Reeves. [72]

Q. Why did you go to see him?

A. Because he had filed a suit in federal court in Dallas against me for some extra charges above the \$1500 that I owed him.

Q. As a matter of fact he had filed a suit there for the same items—I will strike that out—referring to Defendants' Exhibit No. 3, Mr. Stokes, is that the suit that was filed in Texas, are those the papers in that suit?

(Testimony of A. E. Stokes.)

A. It is. It is the papers that were served on me.

Q. Where were they served?

A. At Sidney, Montana.

Q. And you are referring now to Defendants' Exhibit 3?

A. That is right.

Q. Did you read those papers when they were served on you?

A. I did.

Q. And do you notice that they involved a claim by Reeves and Nelson for the same amount that is involved in the present suit pending here?

A. Yes, sir, identical.

Q. And what did you do when those papers were served upon you, meaning that Texas suit?

A. I immediately went to Dallas and went to Mr. Reeves' office.

Q. You were up at Sidney, Montana? [73]

A. Sidney, Montana, and I drove to Dallas, Texas.

Q. And saw Mr. Reeves?

A. Yes, and I asked him.

Q. And what did you discuss with Mr. Reeves at that time and by the way what was the date, August, 1953?

A. It was September 4th, 1953.

Q. Well at that time what did you discuss with Mr. Reeves?

A. Why he had padded that account over the \$1500 that I owed him and we had agreed was the total amount for me to pay when I was able.

Q. And what developed in that conversation? If you will please just tell the court exactly what oc-

(Testimony of A. E. Stokes.)

curred and what the outcome of the conference then was with Mr. Reeves?

A. Mr. Reeves, I asked him why he had padded it and he said: "Hell, you haven't paid anything on it and we have a lot of big expenses and we drilled a barren oil well out here and stuck the pipe," and they had taken over a beer parlor in Dallas and was remodeling and going to big expense there.

Q. And why, what did that have to do with you?

A. And they were just going to have to charge me more for the services rendered.

Q. And what did you say?

A. I says: "I will just go get me an attorney, Jim; we had a gentlemen's agreement and an agreement of \$250 per [74] year and that is what I am going to pay you and that is all. I am going to get me an attorney and we are going to have this out."

Q. Did you do that?

A. Yes, I did, but when I was going out the door he says: "Here, why don't you let Griffis here be your attorney?" And he says: "He won't charge you anything; he can represent us both." And I said: "No, we have an attorney that's represented me for years that I will depend on."

Q. Where?

A. In Dallas, J. Elmore Blakely.

Q. Did you tell Mr. Reeves who the attorney was?

A. No, I didn't tell him then, but I went down

(Testimony of A. E. Stokes.)

and employed Mr. Blakely and he represented me and the suit filed in Dallas it was argued and dismissed.

Q. When was it dismissed?

A. The 28th of November, I believe, but December 1st I received a letter from Mr. Blakely saying it was dismissed.

Q. In what year? A. 1953.

Mr. Dugan: Your Honor, this man speaks too fast. I move to strike the testimony relating to the dismissal as being hearsay and not of this man's knowledge and not the best evidence.

Mr. Wood: It already appears in the record, your [75] honor, the suit was dismissed. This is just confirmation.

Mr. Dugan: Your Honor, I haven't had the opportunity to object before that, your Honor, but it is not responsive to the question put by counsel anyway and he didn't give me an opportunity.

The Court: I don't know whether it is in connection with that question, but it can be divided up if you want to take more time.

Q. (By Mr. Wood): What happened to the Texas suit, Mr. Stokes—Reeves?

A. Stokes you mean?

Q. I am sorry. A. Dismissed.

Mr. Dugan: We object to the testimony of this witness from his recollection of what happened to the suit upon the grounds it is not the best evidence.

Q. If he knows of his own personal knowledge, he can testify as well as anybody else.

(Testimony of A. E. Stokes.)

A. I know personally it was dismissed and Mr. Reeves later confirmed it that they had lost the case, that I had beat them and everything and I have a letter from my attorney.

Q. Now don't go into that at all. After the dismissal of this Texas lawsuit, Mr. Stokes, did you have any contact with Mr. Reeves regarding the account involved? Just say yes or no. [76]

A. Yes.

Q. And when?

A. Some time around the 10th of December, 1953.

Q. And what contact was it, personal or otherwise?

A. He called me over the telephone from Dallas, Texas.

Q. Called you at Sidney?

A. Yes, sir, he called me.

Q. And what transpired, or rather put it this way, what was said in that conversation on the phone?

A. He said: "Here you beat us." And I said: "Yes, I understand that is the result." And he says: "Well, what are you going to do about it?" And I said: "I am going to pay you and I am going to forget this little suit. I will pay you like I said. I have some deals that will be turned soon and I will get you all or a part of your money." And we exchanged greetings, wished each other the best of Christmas and friendly terms.

Q. What did he say?

(Testimony of A. E. Stokes.)

A. I said: "I will pay you what we agreed back on September 9th."

Q. That is what you said.

A. He said: "That is okay, we will do that and settle it off and forget it."

Q. That was when? Did you locate the time exactly?

A. It was around December 10, 1953, after the Texas suit [77] had been dismissed in our favor.

Q. Then what was your next contact if any directly or indirectly with Mr. Reeves and Mr. Nelson?

A. Some 2 or 3 weeks later here comes some papers served on me in Sidney, Montana, on the case being filed at Billings, same case, same figures and everything contrary to an agreement to me over the phone again.

Q. You mean the lawsuit we are now trying before the court? A. That is right.

Q. And the matters have remained in that status ever since?

A. And he would have had his money in February if he didn't file that suit.

Mr. Dugan: I object, that is a self-serving matter, irrelevant and not responsive to the question.

The Court: Yes, let it go out.

Q. (By Mr. Wood): Well then to be specific with respect to that matter, Mr. Stokes, what arrangements if any had you made after this arrangement in December, 1953, by telephone for paying the account?

(Testimony of A. E. Stokes.)

Mr. Dugan: Object to that as irrelevant and immaterial, arrangements he made privately with someone else.

The Court: You mean referring to the telephone conversation [78] about the 10th of December, 1953?

Mr. Wood: Yes, your Honor.

The Court: Well, he has already testified to that.

Mr. Wood: Yes, but I asked him what arrangements he made if any after that conversation to take care of the obligation that was involved.

The Court: That is, if he made any arrangements?

Mr. Wood: Well, if the court please, the understanding in that telephone conversation was that they would stand on the original agreement made.

The Court: Yes, well, carry that further; all right, go ahead.

A. I immediately made arrangements to secure the \$1500 by the sale of some minerals and leases that I had to pay Mr. Reeves.

Q. And then this suit interfered, is that it?

A. That is right.

The Court: What was the amount involved in that suit in Texas?

A. Identical, the same.

Mr. Wood: It is just the same as asked for in this suit.

The Court: In this suit?

Mr. Wood: Yes.

Mr. Wood: Don't make any comment except in

(Testimony of A. E. Stokes.)

answer [79] to questions by inquiries of court or counsel; don't volunteer anything.

Q. (By Mr. Wood): Now what statements if any of this particular account sued upon in this lawsuit did you ever receive from Mr. Reeves or Mr. Nelson, did you ever receive any statements at all? A. I never did.

Q. When did you first learn of the claims by way of an account that Mr. Reeves and his partner are now making, when did you first learn of that?

A. Around in August of 1953.

Q. You mean when this suit was filed in Texas?

A. That is right.

Q. And prior to that time had you received any statements of the account at all from Mr. Reeves or his partner? A. I did not.

Q. So that is when you first learned about it?

A. That is right.

Mr. Wood: You may cross-examine. [80]

Cross-Examination

By Mr. Dugan:

Q. Where were you living in November, 1954, Mr. Stokes?

A. From November, up to November 15, 1954, I lived in Denver, Colorado.

Q. At Denver, Colorado?

A. Yes, and after that I moved to Wichita, Kansas.

Q. And where were you on or about the 22nd of November, 1954, where were you living then?

(Testimony of A. E. Stokes.)

A. I think I was down in Ada, Oklahoma, along about that time because we had gotten possession of the apartment; we got possession the first of December; it was a little apartment but comfortable and we couldn't move in when we got over there.

Q. Do you disagree with your wife you were living at 524 North Fountain in 1954 and 1955?

A. We had not lived there; we had the apartment rented there but we didn't get moved in until——

Q. Until when?

A. 28th or 29th of November.

Q. And you were there then?

A. We had it rented but we were not living there and we bought our furniture and furnished the house, this new apartment. [81]

Q. You recall that your wife testified you were in residence at 524 North Fountain and that she and you were there during the months of December, 1954, and January, 1955, in response to my last question? A. January, 1954?

Q. January, 1955, and December, 1954?

A. December and January we were over——

Q. And you were in residence at 524 North Fountain? A. Yes.

Q. Now I hand you a document marked Plaintiffs' Exhibit No. 5, purporting to be a letter directed by your counsel to you at 524 North Fountain and ask you to state if that is what it is?

A. That is mailed, addressed to A. E. Stokes, 524 North Fountain Street, Wichita, Kansas.

(Testimony of A. E. Stokes.)

Q. Have you ever seen that before?

A. I haven't.

Q. You did or did not receive that through the mail?

A. I did not because we were not, we had it rented but we didn't get possession of it.

Q. I now hand you a document marked Plaintiffs' Exhibit 6 and ask you to state what that is.

A. That is a registered letter to A. E. Stokes, 524 North Fountain Avenue at Wichita, Kansas.

Q. When was it deposited in the United States mails [82] according to the postmark?

A. Well it was in Billings on December 28 and Wichita on December 30th.

Q. Did you receive that document?

A. I did not.

Q. You didn't receive it? A. No, sir.

Q. Have you ever seen the document before?

A. No, sir, I never have.

Q. Where did Mr. Reeves or Mr. Nelson or either of them pick up your records first—where did they first get them?

A. At Gainesville, Texas.

Q. You were living there at that time?

A. No, I was coming through there. I was doing some drilling operations there and they met me there by appointment.

Q. Where was this they met you?

A. At Gainsville there at a court.

Q. A place where you were staying?

A. I was staying there part of the time, my

(Testimony of A. E. Stokes.)

brother-in-law had it rented and I just come there and dropped in there.

Q. They picked up the books then?

A. Part of them up to or preceding up to along in the spring of 1951; the rest of 1951 and 1952 was to be furnished later.

Q. Now prior to that time you had consulted with Mr. [83] Reeves, had you not, as C.P.A. relative to the questions about your income tax, some questions about that over the years, had you not?

A. Yes, since 1946.

Q. From about 1946 and after, and previous to that time you had never actually furnished him any records upon which to draw these returns, nor had you directed him to draw any returns, is that right?

A. That is right.

Q. But on April 16, 1952, you did turn them over first, or a part of them at Gainesville?

A. No, your year is wrong; it was the summer of 1951.

Q. In the summer of 1951?

A. I turned him some more in April of 1952.

Q. Now your original records you furnished him in September, did I understand then that was for the years prior to 1951?

A. It was in the summer I turned him over my ledgers for the business of '46, '47, '48, '49 and '50.

Q. And you say that conference took place in Gainesville when they picked up those records?

A. Yes.

Q. Now was there a later conference or meeting

(Testimony of A. E. Stokes.)

or did either Reeves or Nelson meet you at Gainesville on April 16, 1952? [84]

A. They did not.

Q. So the time you set then by reference to Mr. Reeves' testimony is April 16, 1952, when he first picked up all the records was in fact April, not September, 1951?

A. No, not April, in August, 1951; the records up to '51 and then for 1951 he got them and I took them to him in Dallas, and then when '52 went by in February I took all of '52 to him, and I prepared returns on those in March and they were filed.

Q. All right now answer my question I have just put to you. The conference he testified to about taking place at Gainesville on April 16, 1952, at which time he first picked up the records, this you say actually occurred in August then of 1951?

A. It definitely did.

Q. And at Gainesville? A. It definitely did.

Q. And you say the conference which occurred April 16, 1952, was in his office in Dallas, Texas?

A. What date?

Q. April 16, 1952?

A. It was along in April; I don't know the exact time.

Q. Now between those two dates was there any instruction to prepare the returns for the years '46 through '50 or was that to wait then for the records to be furnished on April 16, 1952? [85]

A. He was to look them over and get them correlated and in order and we would get together to

(Testimony of A. E. Stokes.)

make the deal on the final charge and preparation which we did on September 9th, 1952.

Q. Now prior to April, 1952, the second time he got the records or when he got the balance of the records did you give him or did he have any instructions from you to proceed with the preparation of the 46 to 50 returns or was that to wait the time when you would furnish him with the additional records?

A. When he could get the complete records up.

Q. When you gave these records to him in August, '51, you didn't tell him to go ahead, you said we will get the rest of them to you and then go ahead, isn't that in effect what you said?

A. No, he said we will take these and get them in compiled form so that we can then set them up for connecting entries onto the tax return and also estimate what our charges will be.

Q. Now was nothing said whatsoever on the date of April 16, 1952, relative to whether this was going to be a cash deal, a credit deal or a deal on terms—deal meaning manner of payment for the services rendered and to be rendered, was nothing said at all about that?

A. Well, it was generally understood he was going to [86] have to wait for his money, it was understood the partners would, he and Mr. Nelson would have to wait for their money but they agreed to do it because they knew I would get my business straightened out and pay them.

Q. You didn't have any indication in going and

(Testimony of A. E. Stokes.)

talking to them they would do it for free, you were going to pay them?

A. Certainly I am going to pay for it, still going to.

Q. Either expressly or impliedly in April, 1952, did you discuss the matter or go into the matter in any way concerning what those arrangements were going to be? A. Not definitely.

Q. Well, what did you agree in April, 1952?

A. He agreed to go ahead and get them and work on them and get them in shape and whenever he got it for us we would go down there and arrive at a definite figure and charge.

Q. He was not in a position to give you at that time any final estimate of what the cost would be?

A. That is right.

Q. Now this date, September 9, 1952, you used it repeatedly, how do you know it was September 9, 1952?

A. For the reason that why the check was dated that date and I was in his office on that date.

Q. You know it because the check was dated that date?

A. And I was in his office on that date and he had [S7] written me and called me about the preparation and I went down there for that purpose.

Q. Let me ask you whether or not this conference could have been on the 15th of September?

A. No, it wasn't; it was on the 9th day of September.

Q. How long did you hold this check in your

(Testimony of A. E. Stokes.)

possession before you appeared at Mr. Reeve's office?

A. I got that check on the 8th of September in Oklahoma City in our apartment and I drove down to Dallas and went to his office, arriving the next morning, to make the final agreement with him for them to do the work or I was going to get someone else to do it and I wanted the returns prepared.

Q. Now, I asked you for the date, can you look at that check and tell us what date it was cleared through the bank?

A. It's got a date here of 9/17/52. There's some more dates on this. They deposited it in the Mercantile National Bank, here is Empire State Bank. I am trying to get the exact date they put it in there.

Q. Well, it isn't that important. My point in asking is could your conference have been later than the 9th, could it have been the 15th?

A. No; it was not the 15th, Mr. Dugan.

Q. But the conference that you are referring to in your testimony is September 9th and is the same conference [88] that Mr. Reeves referred to as the date of September 15th in his testimony?

A. Yes; that is the check; it was made on September 9th and not the 15th.

Q. Now, you said after that date of September 9, 1952, until the date of the service on the first suit, the suit in Texas against you, you never had another conference with these people, with Reeves or Nelson, is that right, you never had another

(Testimony of A. E. Stokes.)

meeting with them? A. No; I didn't state that.

Q. Well, what did you do? Tell me, then did you have another meeting with them following this?

A. I did.

Q. And when and where was that?

A. Well, I was in Dallas several times and the final meeting with Mr. Reeves before the Texas suit was filed was on April 3, 1953.

Q. The very date this instrument bears that has been introduced in evidence, April 3rd?

A. What instrument?

Q. Plaintiffs' Exhibit 4, April 3, 1953?

A. I don't know what the instrument is.

Q. You were in Dallas on April 3, 1953?

A. I was.

Q. Was that for the purpose of signing up and filing [89] these income tax returns?

A. No; they had been signed and filed a few days before that. That was for the purpose of Mr. Reeves and Mr. Nelson and I going over to the Collector of Internal Revenue and going over certain items with them and talking with them and we did see three and went over a matter and the gentlemen went back and had a conference and then I left and started back to Oklahoma City.

Q. In fact that date, April 3, 1953, was the date of the signing up, the successful winding up of the service rendered by the plaintiffs in this action; is that right? A. That is right.

Q. And on that date, Mr. Reeves, also, you were handed a statement, were you not?

(Testimony of A. E. Stokes.)

A. I was not handed a statement.

Q. By Mr. Reeves or anyone else?

A. I wasn't handed a statement.

Q. You did not receive a statement in hand?

A. I did not.

Q. For how long were you with Mr. Reeves on the date, April 3, in making these filings and talking to the representatives of the Bureau?

A. There was no filings, Mr. Dugan, we together—I got in there nine o'clock in his office and he tried to call someone and they returned and he called back and we were [90] there an hour or hour and a half and we came back and went to the coffee shop and had coffee and I told them goodbye; they wished me well and they said they would let me know.

Q. You did go out to the office of Mr. Hollister and talk with him for some three hours or so?

A. Of Mr. who?

Q. Mr. Hollister of the Bureau?

A. That is the Internal Revenue; we were there about an hour or hour and a half.

Q. You were there considerable time?

A. In the morning between nine and noon.

Q. And the returns were successful and finding no tax due? A. That is right.

Q. Then in fact you got a refund, didn't you?

A. Yes, sir.

Q. And then do you recall promising Mr. Reeves that you would pay him out of that tax refund when received? A. I recall.

(Testimony of A. E. Stokes.)

Q. Apply it against the expense?

A. I recall he asked me if we couldn't give him that; I said, "No, half of it belonged to Mrs. Stokes, and half would come to me." And I says: "Jim, after I am in shape financially I will send you my half."

Q. If you are in shape?

A. After I am in shape financially. [91]

Q. You didn't promise him absolutely you would pay him out of that income tax return?

A. No; I didn't.

Q. Then when did you receive the income tax refund?

A. On May 16, 1953, we got part and on the 28th we got the other part of 1952.

Q. Of June?

A. No; of May. The 16th of May, 1953, we got the '51 return and then about two weeks later we got the '52 return.

Q. Now, you say you did receive through the mail in July, 1953, at Sidney, Montana, the statement in question in this case which has been marked Plaintiff's Exhibit No. 1 addressed to you and to Mrs. Stokes or the original of that?

A. I did not.

Q. You didn't receive it? A. No; I didn't.

Q. And your box was what?

A. 272 and then 276.

Q. In Sidney, Montana?

A. Sidney, Montana.

(Testimony of A. E. Stokes.)

Q. How large a city is Sidney, Montana?

A. About 4,000.

Q. Were you known in Sidney?

A. Yes, sir.

Q. Well known? [92] A. Yes, sir.

Q. You received mail I presume at your Post Office box and home address?

A. I got all other mail; I don't know why I didn't get it.

Q. In July, 1953, how long had you been residing prior to that in Sidney?

A. From about the 9th or 10th of April, 1953.

Q. Had you had a residence there in previous years? A. No.

The Court: We had better take a recess.

(3:00 p.m.)

(Court resumed, pursuant to recess, at 3:20 p.m., at which time all parties and counsel were present.)

A. E. STOKES

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Dugan:

Q. Mr. Stokes, going back to the matter of the payment of the \$250 on this account by check in blank, I understood you to say that she wanted to pay by check and then you followed up by an explanation it was presented to Mr. Reeves without

(Testimony of A. E. Stokes.)

her being present at all a check which you filled out and which had previously been handed you in blank and you [93] filled it out for the amount of \$250; is that correct?

A. Yes; I filled it out before him and filling it out for that amount here shown.

Q. At the time that check was paid there it bears the date September 9, 1952; at that time the returns for Estelle Stokes and for yourself as far as that is concerned were not yet prepared, were they?

A. They weren't finished.

Q. They weren't prepared at all?

A. He looked it over and had it pretty well patched up; he had possession of the books and ledgers and bank deposits and cancelled checks and had everything in front of him, and he agreed on September 9th.

Q. Answer my question, whether they were substantially completed, particularly the returns for Estelle Stokes, your wife, for the years, '51 and '52, in September, 1952?

A. He could have completed down to '51, he could not have '52 completed but he agreed to finish it all up.

Q. Please don't go beyond the question put to you. Tell me whether or not they substantially could, they weren't were they—the '51 might have been but the '52 could not have been?

A. No; it was not.

Q. And at that time this payment was for serv-

(Testimony of A. E. Stokes.)

cies to be rendered in the future; is that [94] correct?

A. Covered service through '52, completion of hers and mine through '52 was the fee arrived at at \$250 per year, and we had been married two years which would be a total of \$500 for those two years, and I asked him what her part would be and he said half and I said all right here is payment of this with the \$250 then, and that is what I did.

Q. Now, that wasn't a response to any previous demand on his part for the work done previously?

A. No; that was settled and I said, "Now, Jim, what are you going to do this for? What are you going to complete it for?" I says, "What kind of prices do you want now to complete all work through '52?" and we agreed at \$250 per year figure.

Q. Did he give you a receipt for that payment by check?

A. No; the check speaks for itself.

Q. Did you note on it that it was in full for services rendered to Estelle Stokes?

A. No.

Q. To be rendered to Estelle Stokes?

A. No, sir.

Q. I ask you to take another look at it?

A. No; I didn't.

Q. You didn't get a receipt from him? You didn't get any kind of writing for this purported settlement, then, nothing at all? [95]

A. No; that is all that is necessary; the check

(Testimony of A. E. Stokes.)

was receipt enough. I trusted him on my reports from '46.

Q. And likewise he trusted you for payment and furnishing him with all the true details of your business transactions?

A. We were what you call business friends is the way I considered it.

Q. But this was work to be done in the future with regard to a particular segment of the work, was it not?

A. The finishing up of '52, Mr. Dugan.

Q. Now, I think if I have correctly taken down notes of your testimony with regard to this conversation at the office of Mr. Reeves at Dallas on September 4, 1953, after suit had been filed against you in the Texas court I believe you want the court to believe that immediately after you received service of the papers in that case you went to the office of Mr. Reeves and asked him why he had padded the account and that he said to you, "Well, we have been remodeling a beer tavern and we have a shallow oil well and we just have to charge you more." And that was his response? A. Yes.

Q. That is all?

A. That is right, and "We need money and we have to charge more for ourselves."

Q. And this is the same time then as you have indicated before?

A. That is right, and he took me to that beer parlor and [96] showed to me his remodeling job.

Q. And then you couldn't get together and he

(Testimony of A. E. Stokes.)

suggested to you you could go to his attorney who filed the suit and that his attorney, Yale Griffis, could represent both of you in the action; is that right? A. That is what he said.

Q. And that is what you would like to have the court believe? A. That is exactly right.

Q. But instead, you went to Blakely, a man by the name of Blakely, and you got the suit dismissed?

A. I certainly did.

Q. Now, since that is in the record do you have with you the appearance papers or copies of the appearance papers on which you made your appearance in the Texas action?

A. You mean the answer filed or the papers served on me.

Q. Appearance——

A. The only papers I have were served on me.

Q. That were served on you, you don't have copies of the appearance made for you by Mr. Blakely?

A. No; I don't have it in my possession.

Q. So when you say you got the suit dismissed and testify to the disposition of the suit, actually you haven't anything in your hands now to present this court yet in the way of proof of what happened in that court why it was dismissed [97] or anything of the kind?

A. Yes; I have a letter from Mr. Blakely saying it was dismissed and I personally did not hear from it further.

(Testimony of A. E. Stokes.)

Q. Now, I didn't ask you that. I asked you what papers you have.

A. I have a paper from Mr. Blakely advising me it had been dismissed.

Q. I asked you if you have the papers?

A. Yes, sir.

Q. Do you have a copy of your appearance in that suit in Texas?

Mr. Wood: He has already answered that question; I object, it is repetitious.

Mr. Dugan: I have got to go back over it; he says he has papers.

Q. Do you have a copy of the part dismissing it? A. No; I don't have it with me.

Q. At the time that suit was commenced in the State of Texas you were in fact a resident of Oklahoma City and then removed to Sidney, Montana; isn't that correct? A. Pardon?

Q. At the time that Texas suit was filed you were then residing in Oklahoma City and then removed to Sidney, Montana, isn't that correct?

A. No. [98]

Q. What is correct in that respect?

A. I was living at Sidney, Montana, when it was filed.

Q. And service on that suit was made at Sidney, Montana? A. That is right.

Q. Outside of Texas, in other words?

A. Yes.

Q. Did you ever appear and testify in court in

(Testimony of A. E. Stokes.)

that case down in Texas? A. No.

Q. Your attorney appeared for you?

A. My attorney appeared for me.

Q. Now with respect to this conversation you say you had upon Mr. Reeves' call which was on December 10, 1953, did I understand you to say that he said, "You pay me what we agreed on back on September 9, 1952"? A. That is right.

Q. He said that in those words? A. Yes.

Q. In those exact words? A. Sir?

Q. In those exact words?

A. State it again.

Q. Were those the exact words, "You pay what we agreed back on September 9, 1952"?

A. No; it wasn't worded that way. [99]

Q. How was it worded?

A. The best I can recall it he says, "Well, we can just forget what happened and go back to the agreement of September 9th down there and you pay that and everything will be fine."

Q. He mentioned the date, September 9, 1952?

A. Yes.

Q. He mentioned that specifically?

A. Yes; he said the date we made our agreement in Dallas.

Q. Did he mention the date, September 9, 1952?

A. I wouldn't be positive he mentioned the date but he told me, "We will go back to the first agreement for the total work done down here in Dallas," and says, "You pay that and we will just let the thing be settled in full."

(Testimony of A. E. Stokes.)

Q. "The agreement we made in Dallas"?

A. Yes.

Q. Did he give you a date on that?

Mr. Wood: He has already answered that question.

The Court: You are not getting anywhere on that proposition. He says the agreement in Dallas and he told you again the agreement in Dallas was made and when he was in Dallas.

Q. (By Mr. Dugan): Did he refer to any other incident to connect up [100] which agreement you were talking about in Dallas?

A. Nothing more than he said, "Let's go back to the agreement we had in Dallas for the total payment of everything." And he said, "You pay that and that will be fine." He wanted to know how I was getting along and we exchanged Christmas greetings and hung up. That is all there was to it, and I turned around to Mrs. Stokes and told her, "I am going to go and pay Jim just exactly what we agreed on."

Q. You said, did you not, in April of 1953, you had no agreement or understanding with regard to the bill other than what you have previously stated?

A. That is right.

Mr. Dugan: Your witness.

Mr. Wood: No redirect. You are excused.

Mr. Wood: The defendants rest.

The Court: Any rebuttal?

Mr. Dugan: Yes, your Honor, I want to put Mr. Reeves back on the stand and before I do that there

is a short matter I would like to take up with Mr. Wood.

Mr. Wood: We may save some time by talking it over; I don't want to be technical about it.

Mr. Wood: Suppose I dictate something? It is stipulated between counsel that Plaintiffs' Exhibits 5 and 6 are original documents and that the endorsements thereon [101] are all original documents but counsel for the defendants objects to the introduction of the said exhibits into evidence and to each of the exhibits upon the ground that each exhibit is not only irrelevant and immaterial but incompetent otherwise.

Mr. Dugan: Now, your Honor, I might say in that connection the sole reason for interrogation of several of the witnesses in regard to these documents and the offering of these documents into evidence is in respect to the residence of the defendants which we went into on, that the defendants went into on their case relative to the injuries and condition resulting from the injuries left with the court in the earlier motions for continuance; the court recalls evidence of illness and so forth bearing on his good faith and these are bearing on the question of bad faith.

The Court: As I remember the defendants said they weren't living there at the time and they never received them, that while they have rented premises in the apartment there was some furniture being put there or something to that effect, that they weren't living there and that they never received those documents, as I recall the testimony.

Mr. Dugan: May I refresh the recollection of the court. Mrs. Stokes said they were living there December, [102] 1954, and January, and Mr. Stokes said they lived there in December and January, and document No. 5 contains a return endorsement dated at Wichita, December 14. The document No. 5 bears an endorsement cancellation, Billings, December 28th, and return receipt from Wichita, December 30, and return to Billings, January 7, 1954, and 1955, respectively, so I believe they are within the scope of that.

The Court: You think they cover the time they are in residence?

Mr. Dugan: In residence; yes, your Honor.

Mr. Wood: We still object if you offer it in evidence.

The Court: I don't know, you say you wanted to offer it in evidence as bearing upon the question of good faith; I think it is rather farfetched. I think I will have to sustain the objection.

Mr. Dugan: Very well, your Honor.

Mr. Dugan: Plaintiff calls himself on rebuttal.

Rebuttal

JAMES H. REEVES

resumed the stand and testified as follows:

Direct Examination

By Mr. Dugan:

Q. Mr. Reeves, you were sworn in earlier testimony in [103] this case? A. Yes, sir.

(Testimony of James H. Reeves.)

Q. Were you present at any conference between the two defendants at which one instructed the other to furnish you with a check and pay you any amount on this account? A. No.

Q. Did you see a check presented to you by Mr. Stokes before it was filled in on September 9, 1952, or whereabouts?

A. The best I recall is that the check had previously been signed by Mrs. Stokes, in fact I am sure it had and he filled it in at that time.

Q. Filled it in and what did it bear on it, just the signature?

A. As I recall it was made to A. E. Stokes, \$250 and signed by Estelle Stokes, Estelle Parker, or something.

Q. Did you receive that check pursuant to any understanding or agreement with the defendant, A. E. Stokes, it was the payment only and entirely of Estelle Stokes' obligation?

Mr. Wood: Now, if the court please, that is leading and suggestive; let the witness testify.

Mr. Dugan: I believe the objection is well taken, your Honor; I will change the form of that question.

The Court: Yes.

Q. (By Mr. Dugan): When the check in the amount of \$250 was presented [104] to you what was it in response to?

A. It was in response to request for payment by me to Mr. Stokes. In other words, I asked him to pay me some money on account.

(Testimony of James H. Reeves.)

Q. Did he say anything to you during the time of that conference about this being only, payment only of the Estelle Stokes account?

Mr. Wood: I still object to this line of examination as leading and suggestive.

The Court: Yes; it is redirect. You can examine the witness you are examining unless you are using him in rebuttal to show something that has been testified that didn't occur or something has been said that did not occur and then you should put it in the language and refer to the time, place and circumstance under which that was said; if you are using it in rebuttal to impeach the testimony of the other witness, the defendant.

Q. (By Mr. Dugan: Do you recall the testimony of or did you hear the testimony of A. E. Stokes on the stand here? A. Yes.

Q. Do you recall him testifying with respect to a conference with you at your office on September 9, 1952? A. Yes, sir.

Q. And testifying that you and he argued upon the [105] sum of \$250 as full payment of the obligation of Mrs. Stokes?

The Court: Covering the period of——

Q. (By Mr. Dugan): Covering the preparation of returns for her alone, did you agree upon any such? A. No, sir.

Q. Was that matter mentioned in your presence?

A. No, sir.

Q. At that time or any other time?

A. No.

(Testimony of James H. Reeves.)

Q. Had you previous to April 6, 1952, taken into your possession the books of account or other records of either of the defendants? A. No, sir.

Q. When did you get it?

A. April 16, 1952, at Gainesville, Texas.

Q. Do you recall the testimony of Mr. Stokes you contacted them in around August or September of 1951? A. Yes.

Q. At Gainesville, were you present at Gainesville at that time? A. No, sir.

Q. Do you believe that the check of September 9th was drawn and received by you on the date it bears? A. Yes; I do. [106]

Q. You think it was September 9th, 1952?

A. Pardon me. I think I had spoken to Mr. Stokes in Oklahoma City a day or two before so I think it was on that day or around there.

Q. Did you at that time make an estimate or make an agreement with him that you would do the audit work involved in all of these returns at \$250 per year's rate? A. No, sir.

Q. Did you enter into any such agreement?

A. No, sir.

Q. Did you make an estimate at that time?

A. Yes; I did.

Q. At that time how much of the work had been done?

A. It was still in pretty rough shape.

Q. What do you mean by that, will you explain that to the court so that the court can get an idea whether at that time you could or could not deter-

(Testimony of James H. Reeves.)

mine what a reasonable charge would be for the work? A. Will you repeat the question?

Q. Will you explain to the court what you mean by in rough shape at that time?

A. We hadn't progressed very far with the work, we hadn't done a great deal on it.

Q. Were you in position to make an estimate final and binding upon you as to the cost of the operation charged, [107] could you make one?

A. I have been in the practice since '39 and I have never made an estimate on that basis to anybody.

Mr. Wood: That is objected to as not responsive to the question and ask that it be stricken.

A. I made an estimate and told Mr. Stokes a small business set of records normally would require an audit fee of \$300 per year but I would do his work on the basis of \$35.00 per diem, and that is the way it worked out.

Q. In fact did you agree that any particular sum would cover all expenses? A. No, sir.

Q. Did you know at that time what your expenses would be in connection with this?

A. I had no idea.

Q. Mr. Stokes has denied receiving Plaintiffs' Exhibit No. 4, the original of Plaintiffs' Exhibit No. 4 at any time; now can you tell the court the circumstances under which you gave Mr. Stokes that particular statement, to the best of your recollection?

A. Mr. Stokes came to Dallas on April 3rd at my

(Testimony of James H. Reeves.)

request because we were then in shape to file those income tax returns and I wanted him present in the conference, and anticipating his arrival I had the bill prepared; and as I recall we gave it to him after we returned from [108] Mr. Hollister's office. Mr. Stokes, my partner and myself went to Mr. Hollister's office and when we got back to the office I presented a bill to Mr. Stokes in his hand.

Q. You saw him take it? A. Yes; I did.

Q. Do you recall he left the office with it?

A. As I recall he checked it.

Q. Did he examine it in your presence?

A. Yes; he took and looked at it.

Q. You can recall and you can state to the court you recall him examining it in your presence?

A. Yes; I do.

Q. Now, on September 4, 1953, did Mr. Stokes call at your office in Dallas? A. Yes.

Q. And at that time did he make any objection to the account as to the amount?

A. No; he did not.

Q. At that time the matter had been in suit or was in suit? A. It was.

Q. What did he object to?

A. He objected to having a lawsuit filed against him.

Q. What did he say when he came to the office?

A. He said he had \$150 and would either pay me if I [109] dropped the lawsuit or he would hire an attorney to fight it.

(Testimony of James H. Reeves.)

Q. \$150? A. \$150.

Q. What did you say to that?

A. I told him no go.

Q. Was there any further conversation had at that time?

A. Yes; there has been something about the situation about Mr. Griffis, there, an attorney in the office with me, he was there at the time and Mr. Stokes at one time in the conversation he suggested that he had no interest in fighting the lawsuit, and I made the suggestion that he let Mr. Griffis represent us all in the matter and that Mr. Griffis could hold the matter on the docket pending settlement.

Q. Were you discussing settlement at that time?

A. Frankly, no, sir, because Mr. Stokes only had \$150 he wanted to pay me and I wouldn't take it; it was offered to me on several different times.

Q. Was that \$150 offered to you in reduction of the entire account or was it just simply to be applied on account? A. On account, sir.

Q. Do you recall any such telephone conversation on December 10, 1953, as has been related by the defendant, A. E. Stokes?

A. Sir, it is quite likely that I may have called him [110] at any time to collect my money but as to the content of the conversation other than I was asking him to pay me I can't recall.

Q. Well, can you specifically—did you say in a telephone conversation to Mr. Stokes at Sidney on or about the 10th day of December, 1953, "Well, you beat us, we can go back to the"—words to the

(Testimony of James H. Reeves.)

effect, "we can go back to the agreement we made at Dallas"? A. No.

Q. Did you discuss anything with respect to the statement of the account?

A. I remember there was something was said about the trial and I do remember him saying that we beat you and so forth, and I think I rejoined.

Q. Did you say that or did he?

A. I think I rejoined with we are just getting started and I was still asking for payment of my fee which is all I wanted.

Q. Did you refer to any agreement made at Dallas? A. No, sir.

Q. Let me go back to the date September 9, 1952, and ask you whether you at that time expressed or had any concern for him with respect to the matter of financial reverses and accordingly gave him a cut rate, agreed upon any kind of cut rate as he testified to? [111] A. No, sir.

Q. With respect to the discrepancy between Post Office Box 272 claimed to be the Post Office address of the defendants at Sidney, Montana, in early 1953, and Plaintiffs' Exhibit 1 showing Post Office Box 276 had you previously sent mail to the same address shown on this statement? A. Yes.

Q. Directed to the defendants? A. Yes, sir.

Q. And had you received responses to that?

A. Yes.

Q. Did you receive the return of the envelope containing this original of Plaintiffs' Exhibit No. 1?

(Testimony of James H. Reeves.)

A. No, sir.

Q. Did it bear a return address?

A. Yes, sir.

Q. On the outside of the envelope?

A. Yes, sir.

Mr. Dugan: Your witness.

Mr. Wood: No cross-examination.

Mr. Dugan: Plaintiff rests.

Mr. Wood: Would the court like a record?

The Court: That is all. How much time would you want after that for your briefs?

Mr. Dugan: I am at a loss, will the court [112] want findings of fact and conclusions of law and briefs in connection with that in a matter of time?

The Court: Yes; you can submit proposed findings of fact and conclusions of law, but how much time do you need for that and your brief? Your brief is the principal thing so far as the court is concerned.

Mr. Wood: Shouldn't the brief be delayed until we have the record to refer to?

The Court: Yes; after you get the transcript.

Mr. Wood: He is asking you how much time.

Mr. Dugan: I suppose 10 or 15 days. I really don't have in mind what the court is going to need on this matter.

The Court: The court will need a transcript of this and then after you gentlemen have seen the transcript and looked it over or read it over, but upon receipt of it how much time would you need for briefs, 20 or 30 days?

Mr. Dugan: I would say, not in excess of 20 days.

Mr. Wood: 20 is fine.

The Court: All right, 20 days upon the side on receipt of the transcript of the testimony and you may have 10 days for reply, the plaintiff may have 10 days for reply if he thinks it is necessary.

Mr. Wood: In other words, the plaintiff will file the first brief and we will have 20 days thereafter, and [113] then he will have 10.

Mr. Dugan: Your Honor, the proposed findings of fact and conclusions of law will that accompany the brief?

The Court: Yes; you will both submit findings of fact and conclusions of law from your standpoint.

The Court: Very well, I think that is all.

(Court adjourned.) [114]

Certificate

United States of America,
State of Montana—ss.

I, Sidney O. Smith, do hereby certify that I am the Official Court Reporter in the foregoing-entitled Court; that the foregoing-annexed transcript is a full, true and correct transcription of the proceedings had in Civil Cause No. 1570, James H. Reeves, et al., vs. A. E. Stokes, et al., at Billings, Montana, on December 5, 1955; that the proceedings were recorded in shorthand and transcribed on the typewriter by me.

Dated this 4th day of April, 1956.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed May 31, 1956. [115]

[Title of District Court and Cause.]

Certificate of Clerk

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to wit:

Complaint on Account.

Summons.

Alias Summons.

Amended Answer of Defendant, A. E. Stokes.

Amended Answer of Defendant, Estelle Stokes.

Judgment.

Notice of Appeal.

Bond for Costs of Appeal.

Stipulation.

are the originals filed in Case No. 1570, James H. Reeves, et al., plaintiffs, vs. A. E. Stokes, et al., defendants, and designated by the parties as the Record on Appeal in said cause; and I further certify that I transmit herewith as a part of the

Record on Appeal, the Reporter's Transcript of Record, filed on May 31, 1956, and the original exhibits which were received in evidence and called for in the designation, said exhibits being Plaintiffs' Exhibits Nos. 1 and 4, and Defendants' Exhibits Nos. 2 and 3.

Witness my hand and the seal of said Court at Great Falls, Montana, this 24th day of October, A.D. 1956.

[Seal] E. WARREN TOOLE,
Clerk as Aforesaid;

By /s/ C. G. KEGEL,
Deputy Clerk.

[Endorsed]: No. 15354. United States Court of Appeals for the Ninth Circuit. A. E. Stokes and Estelle Stokes, Appellants, vs. James H. Reeves and Isham P. Nelson, Jr., Doing Business as Reeves and Nelson, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana, Billings Division.

Filed October 29, 1956.

Docketed November 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15354

JAMES H. REEVES and ISHAM P. NELSON,
JR.,

Appellees,

vs.

A. E. STOKES and ESTELLE STOKES,

Appellants.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

The Appellants in the above-entitled action having appealed to the above-named Court from judgment in said action entered by the District Court for the District of Montana, the said Appellants now, in compliance with Rule 17(6), of the rules of practice of the above-named Court, present the following, to wit:

I.

Statement of Points Upon Which Appellants
Intend to Rely

1. That the action should have been dismissed as to each defendant in the lower Court—the Appellants here—because of lack of jurisdiction of the Court in the premises;

2. That the plaintiffs below, the Appellees here, have not established the right under the record, to

recover on the pleaded account against either of the defendants, the Appellants here;

3. That, under the record, it affirmatively appears that judgment should have been rendered in the lower Court in favor of the defendants, the Appellants here, and that the action should have been dismissed.

II.

Designation of the Record Which Is Material to the Consideration of this Appeal

All of the pleadings in the lower Court and the balance of the record, all as set forth in the stipulation of counsel, made in the District Court in the above-entitled action, and bearing date of October 19, 1956.

No Assignment of Errors was submitted in the lower Court, under rule 75(d), of the Federal Rules of Civil Procedure, in that the designation, by stipulation, in the lower Court, of the record, is a designation of the complete record of all of the proceedings taken in the lower Court in the above-entitled action.

Dated November 12, 1956.

/s/ STERLING M. WOOD,
Attorney for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed November 14, 1956.

No. 15,354

United States Court of Appeals
For the Ninth Circuit

A. E. STOKES and ESTELLE STOKES,
Appellants,

VS.

JAMES H. REEVES and ISHAM P. NELSON,
Jr., doing business as Reeves and
Nelson,
Appellees.

Appeal from the United States District Court for the
District of Montana, Billings Division.

BRIEF OF APPELLANTS.

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FILED

MAR 14 1957

PAUL P. O'DRIEN, CLERK

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No. 15,354

United States Court of Appeals For the Ninth Circuit

| | | |
|--|---|--------------------|
| A. E. STOKES and ESTELLE STOKES, | } | <i>Appellants,</i> |
| vs. | | |
| JAMES H. REEVES and ISHAM P. NELSON, | | |
| Jr., doing business as Reeves and Nelson, | | |
| | | <i>Appellees.</i> |

Appeal from the United States District Court for the
District of Montana, Billings Division.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

Appellees, James H. Reeves and Isham P. Nelson, Jr., doing business as Reeves and Nelson, brought this action in the United States District Court for the District of Montana against A. E. Stokes and his wife Estelle Stokes. The theory of the action was an account stated in the amount of \$3,038.22 for professional services rendered (R 35).

Jurisdiction of the lower Court was founded on diversity of citizenship and amount in controversy (R 3). A. E. Stokes answered with a general denial, a second defense

of an oral contract in the total amount of \$1,500.00 and a third defense of lack of jurisdiction of the Court (R 6). Estelle Stokes filed a general denial, a second defense of payment in full for professional services rendered to her and a third defense of lack of jurisdiction of the Court (R 8).

The case was tried to the Court without a jury on December 5, 1955, before the Honorable Charles N. Pray, United States District Judge at Billings, Montana. Judgment was entered on September 4, 1956, in favor of the plaintiff in the amount of \$2,000.00 with interest, attorney's fee and Court costs (R 9, 10). It is from this judgment that the appeal is prosecuted.

Appellees' only witness James H. Reeves testified that during April 1952 A. E. Stokes engaged him to do audit work and file income tax returns for Stokes and his first wife (Evelyn F. Stokes) and his second wife Estelle Stokes (R 20, 21, Pl. Ex. 1 R 26-29). On September 15, 1952, the plaintiffs received a payment of \$250.00 on account (R 22, Def. Ex. 2 R 38, 63) in the form of a check made by Estelle Parker, Stokes' second wife.

Reeves completed the returns on April 3, 1953 (R 22) and rendered a detailed statement of account to the defendants on that date in the amount of \$2,627.50 (Pl. Ex. 4 R 56, 57). During July, 1953, Reeves amended the statement of April 3, 1953 to include \$400.00 "Telephone Calls" and \$10.72 "Travel Expenses" making a total balance due of \$3,038.22 (R 23, Pl. Ex. 1 R 26-29). On August 14, 1953, plaintiff brought an action in the United States District Court for the Northern District of Texas for the recovery of \$3,038.22 (R 39-47, Def. Ex. 3) which

was dismissed prior to the bringing of the instant action (R 48, 49).

Reeves stated Estelle Stokes never asked me to do anything for her (R 58). However, her 1951 and 1952 U.S. Individual Income Tax Returns were prepared (R 51, 58, Pl. Ex. 1 Items 10 and 12 R 27).

An estimate of \$300.00 per year for the seven years involved was made in April, 1952 by Reeves for the work to be done (R 47). Reeves denied that any deal as to total value of the services was made during September 1952 (R 48) or September, 1953, after the Texas suit was brought (R 48) or by telephone in November, 1953 (R. 49).

Plaintiff testified that he personally handed the statement of April 3, 1953, to Stokes (R 55) and that he mailed the statement of July, 1953, postage prepaid to A. E. Stokes, P.O. Box 276, Sidney, Montana, (R 22-24) and it was not returned (R 24).

Appellant here, defendant Estelle Stokes, testified that her name previous to her marriage on August 11, 1951 to A. E. Stokes was Estelle Parker (R 59); that Defendants' Exhibit No. 2 (R 63) was payment for preparation of her tax returns for 1951 and 1952 (R 61, Pl. Ex. 1 Items 10 and 12 R 27, 28, Note: Items 2, 4, 6 are for Evelyn F. Stokes, first wife of A. E. Stokes R 20); that she did not know Mr. Reeves (R 65) but she authorized her returns to be prepared (R 69).

Testimony of A. E. Stokes was that during the summer of 1951 he turned over his books and records to Reeves to prepare tax returns for the years 1946 through 1952

(R 78); that on September 9, 1952, Reeves said the total charges would be \$1,750.00 (R 79), that is \$250.00 per year for seven years (R 80) whereupon Stokes filled out and gave Reeves the check of Estelle Parker (Estelle Stokes) in the amount of \$250.00 for her share of the services (R 81, 83, 63); that on this date, September 9, 1952, both Reeves and Nelson agreed to the deal (R 81, 82). Stokes concedes that he owes Reeves and Nelson \$1,500.00 (R 84). It is related by Stokes that Reeves did not give him a statement on April 3, 1953 (R 100, 101) and that he did not receive a statement at Billings, Montana during July 1953 (R 102).

After Reeves and Nelson sued Stokes in Texas on August 14, 1953, Stokes went to Dallas to see them (R 86) and asked why the bill had been padded from the original agreement (R 86, 87). Reeves stated that it was raised because Stokes hadn't paid anything and the firm had big expenses and a barren oil well (R 87). Reeves also wanted his attorney Griffis to represent both sides of the Texas law suit (R 87, see also Reeves' testimony R 118). Stokes obtained his own counsel and was successful in having the Texas action dismissed in early December 1953 (R 89). Immediately thereafter, Reeves and Stokes agreed by telephone to go back to their original agreement of \$1,500.00 (R 89).

ARGUMENT.**I. THE DISTRICT COURT SHOULD HAVE DISMISSED THE ACTION BECAUSE OF LACK OF JURISDICTIONAL AMOUNT IN CONTROVERSY.**

It does not take any stretch of imagination to determine on the record from their own evidence how the appellees were able to allege proper jurisdictional amount in controversy exceeding \$3,000.00 in order to file their action in the Federal Court. After appellees completed their accounting work they prepared a detailed statement of account dated April 3, 1953, showing a balance due of \$2,627.50, however, within thirty days before they brought the action in the Texas Federal Court (identical with the action here) the account was amended by an additional \$400.00 telephone expense and \$10.00 travel expense without changing anything else including the date of the statement to bring the balance to \$3,038.22 (Compare Pl. Ex. 1, R 26 with Pl. Ex. 4, R 56). It should also be noted that plaintiffs' evidence in the Court below is completely lacking in any proof of telephone expense in order to prove sufficient amount in controversy.

Manifestly, such action to obtain jurisdiction in the United States District Court was not in good faith and should not be permitted, it is a fraud upon the Court.

“* * * if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.

“* * * good faith in choosing the Federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if

from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1875."

St. Paul Mercury Indemnity Co. v. Red Cab Co.,
303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845.

In *North Pacific SS. Co. v. Soley*, 257 U.S. 216, 42 S.Ct. 87, 66 L.Ed. 203, the Supreme Court of the United States lays down the rule that it is the duty of the Federal District Court, when it appears that a suit does not really and substantially involve the necessary amount, of \$3,000.00 or more, exclusive of interest and costs, to give it jurisdiction, to then dismiss the suit, and that a District Court may so do whether the parties raise the question of jurisdiction, or not.

Since the finding was made by the lower Court that only \$2,000.00 was due by defendants (appellants here) then it was that Court's duty on the basis of the transcript of evidence to sustain defendants' defense as to lack of jurisdiction of the Court and dismiss the action, and in any event there was no evidence produced at the trial to validly support an amount due in excess of \$3,000.00.

Each of the defendants below affirmatively plead the defense of lack of jurisdiction. This raised an issue of fact on which plaintiff had the burden of proof. *Food Fair Stores v. Food Fair*, C.A. 1, 177 F. 2d 177; *Electro Therapy Corporation v. Strong*, C.C.A. 9, 84 F. 2d 766; *Alexander v. Westgate-Greenland Oil Co.*, C.C.A. 9, 111 F. 2d 769.

II. THE JUDGMENT RENDERED FOR AN ACCOUNT STATED IS NOT SUPPORTED BY THE RECORD.

There is no question but what appellees relied on the theory of an account stated in this action (R 35). The proof adduced by appellees was that appellants impliedly agreed to the account by not paying or protesting and therefore offered no proof as to the items aggregating the total account. If appellees were able to recover at all, the only issue in the case was whether judgment would be for the total account claimed or \$1,500.00 as admitted by A. E. Stokes as the amount due. The Court erred in finding a middle-of-the-road amount for judgment since there is no evidence to support nor any issue which could be resolved in a judgment of \$2,000.00. If it was determined that A. E. Stokes received the April 3, statement of account, it might be possibly found that he by retaining it and not protesting the amount he impliedly consented to such billing. However, if that were true, the jurisdictional amount in controversy would not be sufficient to sustain the jurisdiction of the Court. The record affirmatively shows that A. E. Stokes protested the alleged sum of \$3,038.22 in approximately thirty-one days after he was alleged to have been billed. The matter arose by way of Texas law suit and it required a trip by Mr. Stokes from Billings, Montana to Dallas, Texas. Certainly that was no agreement or implied assent to an alleged account stated.

It is settled law (a) that failure to pay a rendered account raises only at best a rebuttable presumption of assent to the account, and (b), that failure to pay an account is explained away by showing that the only account between the parties is different from the one billed. See 1 *C.J.S., Account Stated*, pp. 716 and 717, and cases.

Here it is claimed by the defendants that an agreement was made, in the fall of 1952, by the defendant, Mr. Stokes, with the plaintiffs, that fixed the compensation of the plaintiffs at a sum less than the amount covered by either of the two bills which the plaintiffs claim to have rendered in 1953, so that, in the nature of things, there was here no assent by either defendant, implied or otherwise, to the account set forth in the bill they contend was mailed out in 1953. Thus, the consent required under the law to create an account stated in the case at bar is wholly lacking and specifically denied prior to the date the account was rendered. But, furthermore, in *Thomasma v. Carpenter*, 175 Mich. 428, 141 N.W. 559, Ann. Cas. 1915A, 690, the rule is laid down that the doctrine of an account stated does not apply to a claim that an express contract exists to pay a plaintiff a specified sum for services, such a claim being in no sense an account. In the note to the Ann. Cas. 1915 reference, supra, it is said, upon authority, that the breach of a simple contract cannot form the basis of an account stated. See also 1 *C.J.* p. 696, where it is said by the author, citing cases, that the rule that assent to an account will be implied from the retention of the account without objection does not apply when the claim is subject to a special contract with which the account is at variance. The defendants herein stand flatly upon the doctrine of these authorities.

Under the statutes of Montana, the burden of proof in this case is upon the plaintiffs. Thus Sec. 93-1501-1, R.C.M., 1947, provides that:

“The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden

of proof lies on the party who would be defeated if no evidence were given on either side.”

And Sec. 93-2001-1, R.C.M., 1947, in paragraph 5 thereof, provides:

“That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence.”

In connection with these Montana statutory provisions, the attention of the Court is invited to the following controlling decisions: Thus, in *Putnam v. Putnam*, 86 Mont. 135, 282 Pac. 855, the Court has the following to say:

“The party holding the affirmative of the issue must produce evidence to prove it. * * * In civil actions where the evidence is conflicting, judgment must go in favor of the party who has the affirmative of the issue, provided he produces in favor of that issue a preponderance of the evidence. * * * Where the evidence as to any fact essential to plaintiff’s right of recovery, and as to which the burden rests upon him, is evenly balanced or in equilibrium, judgment must go for the defendant.”

In *Flaherty v. Butte Elec. Ry. Co., et al.*, 42 Mont. 89, 111 Pac. 348, the Court relates that in civil actions, where the evidence is conflicting, a preponderance of the evidence is the least that will support a verdict.

And in *Northwestern Elec. Co., et al. v. Federal Power Commission*, decided by the Circuit Court of Appeals for the 9th Circuit, and reported in 134 F. 2d 740, the Court has the following to say:

“The ‘burden of proof’ in the sense of ‘persuasion’ is meaningless unless it is also said how strongly a person must be persuaded. For example, if it is said that a person must be persuaded by not less than a ‘preponderance of evidence’ is meant that such evidence is ‘evidence of greater convincing force.’ ”

It is also settled law under *U.S.C.* 28, Sec. 1652, that the law of Montana shall be the rule of decision here in this civil action.

III. JUDGMENT SHOULD HAVE BEEN RENDERED IN FAVOR OF THE DEFENDANT ESTELLE STOKES AND AGAINST DEFENDANT A. E. STOKES, IN THE AMOUNT OF \$1,500.

The evidence in this case clearly shows that Estelle Stokes should have had judgment in her favor. She had two income tax returns prepared and paid \$250.00 for such services. There is no support in the record for the trial Court to find her jointly and severally liable for \$2,000.00 in its judgment.

Plaintiffs’ evidence in the trial Court did not support the amount they prayed for (Plaintiffs’ Complaint R 3, Judgment R 9). They offered no evidence to support a Judgment for a lesser amount. Defendant Stokes admitted he owed \$1,500.00 and on all the evidence it was the duty of the trial Court to enter judgment against him for either the \$1,500.00 or the amount prayed for. It was error for the Court not to enter judgment for one of those two amounts if the evidence supports any judgment as against A. E. Stokes.

It was also erroneous for the Court to enter judgment in the amount of \$400.00 for attorney’s fees under the

Statutes of Texas, Volume 7, Vernon's Civil Statutes of the State of Texas, Annotated, page 219 (R 31). The judgment is based on an account stated, and the place of stating the account was Montana. *Restatement of Conflict of Laws*, Section 322. Montana has no such statute for attorney's fees, so it was therefore erroneous to allow such recovery under a Texas statute.

Dated, March 13, 1957.

Respectfully submitted,

ROYCE B. SICKLER,

HERBERT W. CLARK,

Attorneys for Appellants.

No. 15,354
United States Court of Appeals
For the Ninth Circuit

A. E. STOKES and ESTELLE STOKES,

Appellants,

vs.

JAMES H. REEVES and ISHAM P. NELSON,
Jr., doing business as Reeves and
Nelson,

Appellees.

**Appeal from the United States District Court for the
District of Montana, Billings Division**

BRIEF OF APPELLEES

FRED N. DUGAN,
213 Electric Building
Billings, Montana

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Dallas, Texas

Attorneys for Appellees

FILED

APR 11 1957

PAUL P. O'BRIEN, CLERK

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No. 15,354
United States Court of Appeals
For the Ninth Circuit

| | | |
|--|---|--|
| <p>A. E. STOKES and ESTELLE STOKES,</p> <p style="text-align:center">vs.</p> <p>JAMES H. REEVES and ISHAM P. NELSON, Jr., doing business as Reeves and Nelson,</p> | } | <p><i>Appellants,</i></p> <p><i>Appellees.</i></p> |
|--|---|--|

**Appeal from the United States District Court for the
District of Montana, Billings Division**

BRIEF OF APPELLEES

JURISDICTION

This is an action brought by James H. Reeves and Isham P. Nelson, Jr., Certified Public Accountants, doing business as Reeves and Nelson of Dallas, Texas, against A. E. Stokes and wife Estelle Stokes, residents of Sidney, Montana, in the United States District Court for the District of Montana, Billings Division. Jurisdiction is founded on diversity of citizenship of the parties, and the amount in controversy is a sum in excess of \$3,000.00, exclusive of interests and costs (Title 28, U.S.C. Section 1332 (a)(1)).

STATEMENT OF THE CASE

In April of 1952, A. E. Stokes found himself in the position of not having filed income tax returns with the Government as far back as 1946. On or about the date of April 16, 1952, the plaintiffs Reeves and Nelson, at Stokes invitation, went to Stoke's home in Gainesville, Texas, and conferred with Stokes about the preparation and filing of his delinquent returns. At this conference Reeves and Nelson accepted this employment. In this initial conversation the terms of the employment were fully discussed and understood and agreed upon by Stokes, i.e., that the amount of the work was considerable and plaintiffs expected interim payments (TR 22). That plaintiff could not foresee to the dollar how much time it would take, or money it would cost defendant, but told defendant that records ordinarily in pretty good shape would cost around \$300.00 per year. That defendant had six years delinquent plus the current year (TR 47-48). That plaintiffs would do defendants' work on the basis of \$35.00 per diem (TR 116). That there was no comparison between the difficulty of the work estimated, and the work done, as the seven years work to be done was pitched together in five or six boxes in no particular sequence (TR 52). That the work took a year to prepare and complete (TR 21), and took three certified public accountants a total of 86 days to complete the work and file the returns (TR 28).

Upon the completion of the work and after the returns were filed and accepted by the Government, plaintiff Reeves personally handed defendant Stokes the bill in Reeves' office for plaintiffs services, dated April 3, 1953, invoice No. 2066 (TR 26) in the amount of \$2,877.50. That Stokes took the invoice, examined it, made no objection to the same and left the office with it (TR 117). On September 4, 1954, Stokes came to plaintiff's office after he had been sued on the account and made no objection to the amount (TR 117). That Stokes never made any objection to the amount of the bill nor any item thereof, until he came face to face with the proposition that here was

a debt he was being called upon to pay. That plaintiffs received a lot of promises on the part of Stokes, but no money (TR 22). That in addition, plaintiffs sent Stokes a statement through the United States Mail to their P. O. Box in Sidney, Montana (TR 23). Still no objection to the bill, but no money paid thereon other than \$250.00 on account, on or about September 15, 1952 (TR 22).

ARGUMENT

1. THE JURISDICTION OF THE COURT — THE JURISDICTIONAL AMOUNT IS MORE THAN ADEQUATE.

Since there is no question as to the diversity of citizenship, we turn at once to the jurisdictional amount in controversy. Here the amount, as alleged by the plaintiffs, is actually \$3,788.22. This figure is comprised of \$2,877.50, invoice of April 3, 1953, less payment of \$250.00, or \$2,627.50, plus \$400.00 for telephone calls, plus \$10.72 travel expense to Gainesville, Texas, and return, plus \$750.00 attorneys fees. Plaintiffs' exhibits Nos. 1 (TR 26-27) and 4 (TR 56-57) received in evidence completely set forth these items.

Let us assume only for the purposes of argument that appellants' position, that the amount in controversy is only the \$2,627.50 item. Their position completely collapses in the face of the Texas Statute, R.S. 2226, as amended, concerning attorneys fees, as the same constitutes an integral portion of the amount in controversy. The Texas decisions are unanimous on the point, "attorneys fees constituted a part of the amount in controversy so as to confer appellate jurisdiction on the Court of Civil Appeals," *Wichita Valley Ry. Co. v. Leatherwood* 170 SW 262. "Attorneys fees sought to be recovered under this article were not merely 'costs', but were a part of the 'amount in controversy' within the statutes fixing the jurisdiction of Courts", *Houston Packing Co. v. McDonald*, 175 SW 806. The point is also settled in the Federal Courts by a case on "all fours". "In suit in Federal Courts, on sworn account for

materials furnished in the amount of \$2,767.45, and \$500.00 alleged to be reasonable attorneys fees, dismissed on the ground that the amount in controversy did not exceed \$3,000.00, exclusive of interests and costs was error, in view of this article," *Crescent Lumber and Shingle Co. v. Rotherum*, C.A., 218 Fed. 2nd 638.

Now we come to the position of appellant questioning good faith on the part of appellee and raising the question of fraud upon the Court. As appellees view the matter, an individual who is intelligent enough to be in the oil and gas leasing business over a period of years surely must have known that he was required by law to file income tax returns. For six years appellant did not. He knew better. When, as is self evident, from the work performed by appellees, appellant did not file, the cry of "good faith" and "fraud" on the part of appellant somehow have a dull and hollow ring. The plaintiffs made a *prima facie* showing that the amount in controversy was in excess of the \$3,000.00 jurisdictional minimum both in Reeves' statement of the amount due and by the introduction of plaintiffs' Exhibit No. 1. "The rule governing dismissal for want of jurisdiction in cases brought in the Federal Court is that, the sum claimed by the plaintiffs controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L. Ed. 845; *Moehl v. E. I. DuPont DeNemours & Co.* 84 F.Supp. 427. Regardless of the ultimate outcome of this lawsuit, this Court has jurisdiction. *Binderup v. Pathe' Exch.* 44 S.Ct. 96, 263 U.S. 291 68 L.Ed. 308; *Flanders v. Coleman* 39 S.Ct. 472 250 U.S. 223 63 L.Ed. 948; *Pacific Electric R. Co. v. Los Angeles, Calif.* 24 S.Ct. 586 194 U.S. 112 48 L.Ed. 896.

II. THE JUDGMENT RENDERED IS AMPLY SUPPORTED BY THE PLEADINGS AND EVIDENCE.

Plaintiffs alleged an action for account in the amount of \$3,038.22, in the form prescribed by the Federal Rules.

4 Bender's Federal Practice Forms 226.1

Defendants separately denied the allegations of paragraph II of plaintiffs' complaint by general denial. Under this allegation the plaintiffs made prima facie proof of an account stated, the elements thereof being revealed as follows: Prior business dealings with the defendants; preliminary agreement on the part of the defendants that they were to pay for services rendered by the plaintiffs (TR 22); the making of a payment on account constituting all credits against the account (TR 22); the rendition of account upon final completion of the services by mailing statement to the defendants' usual address and its non-return as indicating receipt (TR 23); the retention of the statement by the defendants under conditions indicating their approval thereof (TR 55, 117); proof of the account stated by carbon copy thereof upon the non-production of the original at the time of trial (TR 25).

By this proof plaintiffs made out a *prima facie* case under the theory of an account slated. Where parties have been engaged in a course of dealings and there is an antecedent indebtedness in favor of one as against the other, and an account or bill purporting to be a statement of the account is rendered by the creditor to the debtor, who retains the same for an unreasonable length of time without objection, this is evidence of the assent of the correctness of the account, and, according is an account stated. *Mutch & Young v. Powers* 63 Mont. 437, 443, 207 Pac. 621; *Norum v. Ohio Oil Co.*, 83 Mont. 353, 362, 272 Pac. 534; *Thos. O. Hanlon Co., Inc. v. Jess* 58 Mont. 415, 418, 193 Pac. 65. The Montana Rule is that evidence showing an account stated may be admitted, and is sufficient, to support a cause of action on an open account. *Roy v. King's Estate*, 55 Mont. 567, 573, 179 Pac. 821; *Rogers-Templeton Lumber Co. v. Welch*, 56 Mont. 321, 328, 184 Pac. 838; *Mutch & Young v. Powers*, 63 Mont. 437, 444, 207 Pac. 621.

III. THE ADEQUACY OF THE JUDGMENT.

(a) The appellees are not aware of any rule of law that states in a contested action that a judgment cannot be rendered for a lesser amount than sued for. Nor are appellees aware of any rule that requires a court to give any reason as to how the court arrived at a certain decision or judgment for a certain amount. This was a trial before the court and he was the exclusive judge of the law and the facts. Appellees do not contest the amount of the judgment of the court below, but do respectfully suggest that if the appellate court revises the amount of the judgment that such revision be upward for the full amount sued for.

(b) As to the interest claim, while interest was not demanded in the Complaint, Mr. Reeves appearing for the plaintiffs was permitted to testify to the amount of interest on the defendant's obligation from the date of rendition of the account stated (July, 1953) to the time of trial. Since there was no objection to this evidence, the Complaint should be deemed amended to permit the recovery of interest in addition to the principal amount of the account stated. *R.C.M. 1947 Sec. 47-124; R.C.M. 1947, Sec. 17-204; Nuhn v. Nuhn* 97 Mont. 596, 601, 37 Pac. 2d. 571; *Lackman v. Simpson* 46 Mont. 518, 525, 129 Pac. 325; *Moss v. Goodheart*, 47 Mont. 257, 268, 131 Pac. 1071; *Rhule v. Thrasher* 88 Mont. 468, 477, 295 Pac. 266; *Blackweider v. Fergus Motor Co.*, 80 Mont. 374, 387, 260 Pac. 734; *Parsons v. Rice*, 81 Mont 509, 264 Pac. 396; *Davis v. Claxton* 82 Mont. 574, 593, 268 Pac. 787; *Ingebrightsen v. Hatcher* 87 Mont. 482, 485, 288 Pac. 1023, 1024.

(c) As to the matter of attorney's fees, plaintiffs alleged in paragraph III of their Complaint the statute of the State of Texas relating to non-payment of claims and the allowance of attorney's fees in addition to the principal amount and claimed that the reasonable value of legal services was \$750.00. Defendants in their separate answers made a general denial of this paragraph. At trial the plaintiffs made proof of the Texas Statute, asking the Court to take judicial notice of the Statute

under *Rule 43* of the Federal Rules (TR 29-31). General objection was made by the defendants' counsel to the introduction of this evidence, although he conceded that there was no objection to the competency of the proof.

The law governing the substantive aspects of the cause of action is the law of the forum from which the account stated was mailed and in which the account was to be paid. *1 C.J.S.* 695; *15 C.J.S.* 880-889.

Since the cause of action sued on here arose in, and was to be performed in, the State of Texas, the laws of the State of Texas and not the laws of the State of Montana, would govern the right to recover attorney's fees, since the substantive rights of the parties are governed by the *lex loci*. *Prudential Ins. Co. of Am. v. Carlson*, 126 F. 2d. 607, 611.

State statutes allowing the recovery of attorney's fees in special classes of action have been upheld as constitutional by the United States Supreme Court and they have been given effect in suits brought in the Federal Courts. *People of Sioux County, Nebr. v. National Surety Co.* 276 U.S. 238, 48 S.Ct. 239, 240.

Against the contention that no other costs can be charged in a Court of the United States than those authorized by Federal Statutes, the Supreme Court held that the objection applies only to ordinary costs, and not to allowances for attorney's services provided by state's statutes. *People of Sioux County, Nebr. v. National Surety Co. (Supra)*.

(d) Finally the Court below was correct in finding Estelle Stokes jointly and severally liable with her husband A. E. Stokes. She not only received a real benefit from the preparation and filings of her own returns, which were part of the services engaged for by the said defendants, she also received a benefit far beyond what is apparent in the record. If these delinquent income tax returns of A. E. Stokes had not been prepared accurately, and if the same had not been accepted by the Govern-

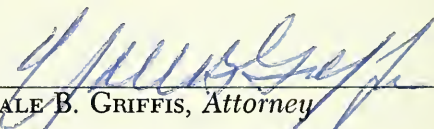
ment, the seriousness of such a situation would be most obvious. It is not without the realm of possibility that by Government action A. E. Stokes could have been deprived of his liberty for a time and Estelle Stokes deprived of the care, companionship, and company of her husband.

CONCLUSION

For the reason hereinbefore stated the judgment of the District Court should be affirmed.

Respectfully submitted,

FRED N. DUGAN, *Attorney*

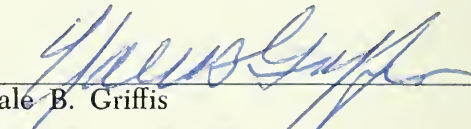


 YALE B. GRIFFIS, *Attorney*
Attorneys for Appellees

CERTIFICATE OF SERVICE

The undersigned attorney of record for James H. Reeves and Isham P. Nelson, plaintiffs-appellees, hereby certifies that he has on this date sent by mail to Herbert W. Clark, 1110 Crocker Building, San Francisco 4, California, attorney for defendant-appellants, A. E. Stokes and wife Estelle Stokes, four copies of this brief.

Dated at Dallas, Texas, this the 9th day of April, 1957.



 Yale B. Griffis
Attorney for Appellees.

No. 15,354
United States Court of Appeals
For the Ninth Circuit

A. E. STOKES and ESTELLE STOKES,

Appellants,

vs.

JAMES H. REEVES and ISHAM P. NELSON,
Jr., doing business as Reeves and
Nelson,

Appellees.

Appeal from the United States District Court for the
District of Montana, Billings Division

APPELLEES' PETITION FOR REHEARING

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Attorneys for Appellees

FILED

JUN 29 1957

PAUL P. O'BRIEN, CLERK

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No. 15,354
United States Court of Appeals
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A. E. STOKES and ESTELLE STOKES,

Appellants,

vs.

JAMES H. REEVES and ISHAM P. NELSON,
Jr., doing business as Reeves and
Nelson,

Appellees.

**Appeal from the United States District Court for the
District of Montana, Billings Division**

APPELLEES' PETITION FOR REHEARING

Come now Appellees, James H. Reeves and Isham P. Nelson, and present this their Motion for Rehearing by this Honorable Court and for cause would show as follows:

That although Appellees may have been amiss in not including the "Findings of Facts and Conclusions of Law" in the Record on Appeal, still the Honorable Charles N. Pray, United States District Judge who tried the case below actually did, at the conclusion of the Testimony, make such Findings of Fact and Conclusions of Law, which were dated, signed by said Court, and filed September 4, 1956, which Findings of Fact and Conclusions of Law were as follows:

**In the District Court of the United States in and for the
District of Montana, Billings, Montana**

JAMES H. REEVES and ISHAM P.
NELSON, JR., DBA REEVES &
NELSON,

Plaintiffs,

v.

A. E. STOKES, and wife,
ESTELLE STOKES

Defendants.

**Civil Action
No. 1570**

**FINDINGS OF FACT
and
CONCLUSIONS
OF LAW**

Filed Sept. 4, 1956
E. WARREN TOOLE, *Clerk*
By C. G. KEGEL, *Deputy*

This cause came on regularly for trial at the Federal Building at Billings, Montana, on December 5, 1955, before the Court, sitting without a jury, and the Court having heard all of the evidence introduced in said cause, and being fully advised in the premises, finds the facts and states the conclusions of law, as follows:

FINDINGS OF FACT

1. That this Court has jurisdiction of the above entitled cause upon the basis of diversity of citizenship and the amount in controversy, in that plaintiffs are citizens of Dallas, Texas, and that the defendants were at the time of the commencement of the action, citizens of Sidney, Montana, and that the amount in controversy, consisting of the claim of the plaintiffs made in good faith, exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. That the plaintiffs were employed by the defendants for the purpose of preparation of certain Income Tax Returns of the defendants, for which services the defendants agreed to pay the reasonable value thereof, and that the plaintiffs

furnished said services for a period of several years prior to the month of July, 1953.

3. That the reasonable worth and value of said services performed by the plaintiffs at the request of the defendant, was in the sum of \$2,250.00.

4. That payment for said services was due from the defendants to the plaintiffs by the month of July, 1953, but that the defendants paid on said account the sum of \$250.00 only, leaving a balance due as of the month of July, 1953, in the sum of \$2,000.00.

5. That a reasonable sum to be allowed to the Plaintiffs for the services of their attorney in this suit on their behalf is in the sum of \$400.00.

6. That the plaintiffs and the defendants did not enter into such agreement as is set forth in the Second Defense of the defendant, Estelle Stokes.

7. That the plaintiffs and the defendants did not enter into such an agreement as is set forth in the Second Defense of the defendant, A. E. Stokes.

CONCLUSIONS OF LAW

1. That the defendants owe the plaintiffs for professional services rendered by the plaintiffs unto the defendants the sum of \$2,000.00, together with interest thereon at the rate of six per cent (6%) per annum, from the 31st day of July, 1953, until paid.

2. That in addition thereto the plaintiffs are entitled to recover of and from the defendants a reasonable attorney's fee in the sum of \$400.00, together with the costs of suit herein expended.

IT IS SO ORDERED, and that judgment be entered in accordance herewith.

Dated September 4th, 1956.

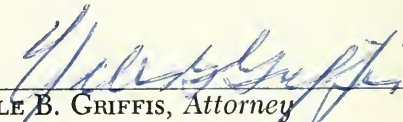
CHARLES N. PRAY
United States District Judge

ARGUMENT

In such Findings the Trial Court concluded the Appellees were entitled to a Judgment against the Defendants for \$2,000.00 for their professional services, together with interest at 6% from July 31, 1953, plus attorney's fees in the amount of \$400.00.

Appellees pray this Honorable Court to reform such Judgment heretofore rendered by the Trial Court in accordance with the decision heretofore made by this Court on Appeal, and further pray that this Court render Judgment against A. E. Stokes, for \$2,000.00 plus interest thereon at 6% from July 31, 1953, until paid, plus \$400.00 attorney fees, together with Costs, and for such other relief as Appellees may be entitled.

Respectfully submitted,


YALE B. GRIFFIS, Attorney
Attorney for Appellees

CERTIFICATE

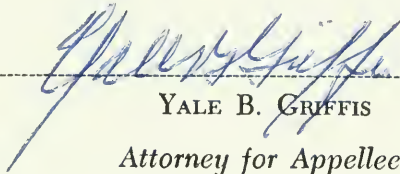
I, Yale B. Griffis, one of the Counsel for Appellees herein, hereby certify that in my judgment this Petition for Rehearing is well founded and that it is not interposed for delay.


YALE B. GRIFFIS, Attorney

CERTIFICATE OF SERVICE

The undersigned attorney of record for James H. Reeves and Isham P. Nelson, plaintiffs-appellees, hereby certifies that he has on this date sent by mail to Herbert W. Clark, 1110 Crocker Building, San Francisco 4, California, attorney for defendants-appellants, A. E. Stokes and wife Estelle Stokes, four copies of this brief.

Dated at Dallas, Texas, this the 27th day of June, 1957.



YALE B. GRIFFIS
Attorney for Appellees



No. 15356

United States
Court of Appeals
for the Ninth Circuit

ROYAL E. JORGENSEN and MARY M. JOR-
GENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

FILED

JAN 18 1957

PAUL P. O'BRIEN, CLERK



No. 15356

United States
Court of Appeals
for the Ninth Circuit

ROYAL E. JORGENSEN and MARY M. JOR-
GENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

APPEARANCES

GEORGE G. HOLDEN, ESQ.,
Courthouse,
Austin, Nevada,
For Petitioners.

CHARLES K. RICE,
Assistant U. S. Attorney General,
LEE A. JACKSON,
Attorney, Department of Justice,
Department of Justice,
Washington 25, D. C.,
For Respondent.

The Tax Court of the United States

Docket No. 60789

ROYAL E. JORGENSEN and MARY M. JORGENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1956

- Jan. 23—Petition received and filed. Taxpayer notified. Fee paid.
- Jan. 24—Copy of petition served on General Counsel.
- Feb. 27—Entry of appearance of George G. Holden as counsel filed.
- Mar. 19—Motion to dismiss for lack of jurisdiction filed by respondent.
- Mar. 22—Hearing set on respondent's motion for April 25, 1956, Washington, D. C.
- Apr. 25—Petitioner's written argument to respondent's motion to dismiss filed.
- Apr. 25—Hearing had before Judge Murdock on motion of respondent to dismiss. Granted.
- Apr. 26—Ordered, that respondent's motion to dismiss is granted and proceeding is dismissed for lack of jurisdiction.
- July 26—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

1956

July 26—Proof of service filed.

Aug. 7—Designation of record on review filed by petitioner.

Aug. 7—Proof of service of designation of contents of record on review filed.

Aug. 30—Order extending time for filing record on review and docketing petition for review to October 24, 1956, entered. Served 8/31/56.

Sept. 5—Transcript of Hearing April 25, 1956, filed.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, DDIR:A:90-D:LEB:min, dated October 20, 1955, a copy of which is attached hereto and by reference made a part hereof, and as a basis of his proceedings alleges as follows:

1. The above-named petitioners are husband and wife, individuals, and are the taxpayers against whom the said deficiency was determined, and whose residence is the International Hotel, Austin, Nevada. The return for the period here involved was filed with the Collector for the Reno district of Nevada.

2. The notice of deficiency was mailed to the petitioners on October 20, 1955.

3. The taxes in controversy are income taxes for the calendar year 1952, and are in the amount of \$2,917.14, plus penalties \$439.68.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in not using the facts as set forth in petitioners' return.

b. The Commissioner erred in disallowing deductions for operation, maintenance and depreciation of petitioners' trucks.

c. The Commissioner erred in disallowing petitioners' deductions for cost of labor.

d. The Commissioner erred by making an arbitrary determination of the petitioners' taxes based on petitioners' gross bank deposits.

e. The Commissioner erred in determining a deficiency against the petitioners.

f. The Commissioner erred in that his determination of the deficiency is without basis in evidentiary facts.

g. The Commissioner erred in that his determination tends to deprive the petitioners of property without due process of law.

5. The facts upon which the petitioners rely as the basis for this proceeding are as follows:

a. The petitioners kept their books and made their return for the year 1952 on a cash basis.

b. The petitioners were in the trucking business in the taxable year 1952, and also both worked for wages.

c. The petitioners reported their gross receipts in their trucking business, from which they subtracted costs of operation of the trucks used in the said business, the cost of maintenance and the depreciation of said trucks.

d. The petitioners also subtracted the cost of labor for the operation of said trucks, and the withholding statements for such labor were duly and properly filed. There were no other deductions claimed and the results of subtracting the foregoing deductions from the gross receipts were entered as the net profit of the business. The said net profit was added to the gross wages and the sum of which was used as the taxable income. All of which is pursuant to, and within the confines of, the Internal Revenue Code.

e. The Commissioner rejected the petitioners' return as set forth above, and merely added the petitioners' gross bank deposits together, and called that the adjusted gross income. The Commissioner then allowed the standard deduction of \$1,000.00 and determined petitioners' taxes on the balance, all of which is contrary to the Internal Revenue Code and the Constitution of the United States.

f. The gross bank deposits have little, if any, bearing on the net profit of a business, and would therefore not be considered as evidentiary in determining a taxpayer's income where other good and competent evidence is available. The petitioners filed a return in which they set forth the necessary evidentiary facts for making a determination of the petitioners' taxable income, and to use any other

bases for a determination of said income is arbitrary and tends to deprive the taxpayer of property without due process of law.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine that there is no deficiency due by petitioners for the year 1952, and that no penalties should be assessed.

/s/ GEORGE G. HOLDEN,
Counsel for Petitioners.

(Copy)

U. S. Treasury Department
Internal Revenue Service
P. O. Box 891, Reno, Nevada

Form 1230 (Nov. 1953)

(Seal)

Office of
District Director of Internal Revenue

Oct. 20, 1955.

Mr. Royal E. Jorgensen and
Mrs. Mary M. Jorgensen
Husband and Wife
Austin, Nevada

Dear Mr. and Mrs. Jorgensen:

You are advised that the determination of your income tax liability for the taxable year ended

December 31, 1952, discloses a deficiency of \$2,917.14 plus penalties of \$439.68 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, P. O. Box 891, Reno, Nevada.

The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after the receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By V. W. EVANS,
District Director of
Internal Revenue.

Enclosures:

Statement

Form 1276

Agreement Form

Duly verified.

Received and filed January 23, 1956, T.C.U.S.

Served January 24, 1956.

[Title of Tax Court and Cause.]

MOTION TO DISMISS

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and

Moves to dismiss the above-entitled proceeding for lack of jurisdiction and for cause avers:

That the notice of deficiency herein was mailed on October 20, 1955;

That the envelope containing the petition herein was postmarked Ely, Nevada, January 20, 1956, a Friday;

That January 20, 1956, falls on the 92nd day after October 20, 1955; and

That pursuant to sections 6213 and 7502 of the Internal Revenue Code of 1954, the petition herein was not timely filed.

Wherefore, it is prayed that this motion be granted.

/s/ JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

Filed March 19, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

MINUTES OF PROCEEDINGS
APRIL 25, 1956

On motion of respondent to dismiss.

Ordered: Granted.

Exhibits: Respondent's

A. Photostat copy of mailing list.

/s/ RALPH A. STARNES,
Deputy Clerk.

[Title of Tax Court and Cause.]

PROCEEDINGS

Wednesday, April 25, 1956

The proceedings in the above-entitled matter came on for hearing, pursuant to notice, at 11:15 o'clock a.m.

Before: Honorable J. Edgar Murdock.

Appearances:

THOMAS E. TYRE, ESQ.,
On Behalf of the Respondent.

The Clerk: Docket No. 60789, Royal E. Jorgensen and Mary M. Jorgensen.

Mr. Tyre: If your Honor please, this case is before the court on Respondent's motion to dismiss for lack of jurisdiction on the ground that the petition was not timely filed. The deficiency notice was mailed to the taxpayer on October 20, 1955. The petition was mailed to the Tax Court on January 20, 1956, which was ninety-two days after the mailing of the statutory notice. In support of his motion, Respondent offers a photostat of the mailing list showing that the deficiency notice was mailed on October 20, 1955.

The Court: It may be filed, and the motion is granted.

(Whereupon, at 11:17 o'clock a.m., the proceedings in the foregoing matter were concluded.)

Filed September 5, 1956, T.C.U.S.

The Tax Court of the United States

Docket No. 60789

ROYAL E. JORGENSEN and MARY M. JORGENSEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF DISMISSAL

This case came on for hearing April 25, 1956, at Washington, D. C., upon respondent's motion to dismiss for lack of jurisdiction, alleging that the petition was not filed within the time prescribed by statute. Counsel for respondent argued the motion. Petitioner filed on April 25, 1956, a response to the motion. It appears from the record that the petition was not filed within the time prescribed by statute. The premises considered, it is

Ordered: That respondent's motion to dismiss is granted and the proceeding is dismissed for lack of jurisdiction.

/s/ J. E. MURDOCK,
Judge.

R.S.

Served: April 30, 1956.

Entered: April 30, 1956.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Come Now the Petitioners above named, by their attorney, George G. Holden, Esq., and petition the above-entitled Court as follows:

I.

That Petitioners are residents of the State of Nevada.

II.

That said State of Nevada is located within the Ninth Circuit.

III.

That the above-entitled case shall be reviewed in the United States Court of Appeals for the Ninth Circuit.

IV.

That the case at bar arose as a result of the assessment of a deficiency by the Commissioner against the Petitioners and taxpayers.

V.

That on the 26th day of April, 1956, the Tax Court of the United States entered its order dismissing said case for lack of jurisdiction.

VI.

That it is the last above-mentioned order for which review is sought.

Wherefore, Petitioners pray that:

1. That a review by the United States Court of Appeals for the Ninth Circuit shall be allowed.

2. That all files and records in the said case necessary to be transmitted to said Court shall be so transmitted as provided by law.

Dated this 23rd day of July, 1956.

/s/ GEORGE G. HOLDEN,
Attorney of Record for
Petitioners.

Received and filed July 26, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on review and docketing the petition for review in the United States Court of Appeals for the Ninth Circuit is extended to October 24, 1956.

Dated: Washington, D. C., August 30, 1956.

[Seal] /s/ J. E. MURDOCK, R.S.
Judge.

Served Aug. 31, 1956.

Entered Aug. 31, 1956.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 11, inclusive, constitute and are all of the original papers and proceedings as called for by the "Designation of Record on Review," on file in my office as the original and complete record in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court proceeding have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of October, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15356. United States Court of Appeals for the Ninth Circuit. Royal E. Jorgensen and Mary M. Jorgensen, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed October 24, 1956.

Docketed November 8, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Docket No. 15356

ROYAL E. JORGENSEN and MARY M. JOR-
GENSEN,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' POINTS TO BE
URGED ON REVIEW

Come Now the appellants above named, by their attorney of record, George G. Holden, Esq., and submit the following Points in support of their Petition for Review in the above-entitled matter.

1. That Commissioner's Motion to Dismiss was not filed within forty-five (45) days from the time he was served with the Petition filed herein.

2. That the Petition herein was filed before the Commissioner had made a legal move to recover on his deficiency notice.

3. That to dismiss the Petition filed herein would be to deny the Appellants due process of law, both remedial and substantive as provided by the United States Constitution.

4. That to dismiss the Petition without a hearing on its merits would be to arbitrarily force the

Appellants to pay a tax amount which they do not owe under the law.

5. That to dismiss the Petition herein is to give the Commissioner the legislative power to levy and collect a tax on income different and separate from that tax on income authorized by Congress, and since Congress has no power to delegate its legislative authority, it is unconstitutional for the Commissioner either to assume such authority or for the Court, by its act, to award him such authority.

6. That Section 6213 (a) and (c) of the United States Code 1954, which the Commissioner has cited, provides a time limit within which the Commissioner may not recover on his deficiency. There is no statement in the said Sections which may be construed to mean that the Court has no jurisdiction to hear a case not brought before it within ninety days.

7. That notwithstanding the fact that the Petition is entitled "Petitioners vs. The Commissioner," the Appellants are defendants in every legal sense of the word, and under the Constitution of the United States are entitled to all the rights and privileges of defendants in any other Court or any other kind of case.

/s/ GEORGE G. HOLDEN,
Attorney of Record.

[Endorsed]: Filed November 27, 1956, U.S.C.A.

No. 15,356

United States Court of Appeals
For the Ninth Circuit

ROYAL E. JORGENSEN and
MARY M. JORGENSEN,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' BRIEF ON REVIEW.

GEORGE G. HOLDEN,

Box 24, Battle Mountain, Nevada,

Attorney for Appellants.

FILED

MAR 28 1957

PAUL P. O'BRIEN, CLERK

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No. 15,356

**United States Court of Appeals
For the Ninth Circuit**

ROYAL E. JORGENSEN and
MARY M. JORGENSEN,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' BRIEF ON REVIEW.

JURISDICTIONAL PLEADINGS AND FACTS.

Jurisdiction in the above-entitled matter was obtained by the Tax Court in the first instance by the filing of a notice of deficiency by the Commissioner of Internal Revenue and a subsequent filing of a Petition by the taxpayers-appellants.

Said Petition is set forth verbatim in the Transcript of Record and contains the necessary allegations as provided by Section 6213 (a) of the Internal Revenue Code and Rule 7 of the Rules of Practice before the Tax Court of the United States.

STATEMENT OF THE CASE.

This case arose as a result of a deficiency notice, dated October 20, 1955 and mailed to the Appellants. Appellants, by their counsel of record, prepared and mailed a Petition to the Tax Court of the United States by airmail, special delivery, on January 20, 1956.

On January 23, 1956, said Petition was received and filed. On March 19, 1956 Appellee filed a motion to dismiss in the above-mentioned Court.

Said Motion stated its ground for dismissal as lack of jurisdiction in the said Tax Court; in that said Petition was not filed within ninety days from the date of the deficiency notice. Appellants filed a written response to the motion, and said response was not considered since the record showed on its face that the Petition was not filed within ninety days. Whereupon the Tax Court entered its order of dismissal.

The questions squarely raised on review are as follows:

1. Whether or not the Tax Court is divested of jurisdiction where a Petition has not been filed within ninety days from the date of the deficiency notice, but is filed prior to any legal move having been taken by the Commissioner to take advantage of such default.

2. Whether Appellee's motion to dismiss was timely.

3. Whether or not a dismissal of this particular case would deny Appellants due process of law, both remedial and substantive.

4. Whether or not a dismissal of this case would arbitrarily force Appellants to pay a tax amount which they do not lawfully owe.

5. Whether or not a dismissal of this case would constitute an unlawful delegation of legislative powers to the Commissioner.

The foregoing questions were all raised in Appellants' Response to Appellee's Motion to Dismiss. Inasmuch as the Minutes of the proceedings of the Tax Court show no consideration or ruling on the points thus raised, said written Response was not included in the Record on Review and are hereby raised and will be argued again on the basis that the Court below erred in not ruling on said questions.

SUMMARY OF POINTS TO BE ARGUED.

1. That the Commissioner's Motion to dismiss was not filed within forty-five days from the time he was served with the Petition filed herein.

2. That the Petition filed herein was filed before the Commissioner had made a legal move to recover on his deficiency notice.

3. That to dismiss the Petition without a hearing on its merits would be arbitrarily to force the Appellants to pay a tax amount which they do not owe under the law.

4. That to dismiss the Petition filed herein would be to deny the Appellants due process of law, both remedial and substantive as provided by the United States Constitution.

5. That to dismiss the Petition herein is to give the Commissioner the legislative power to levy and collect a tax on income different and separate from that tax on income authorized by Congress, and since Congress has no power to delegate its legislative authority it is unconstitutional for the Commissioner to assume such authority or for the Court, by its act, to award him such authority.

6. That Section 6213 (a) and (c) of the United States Code, 1954, which the Commissioner has cited, provides a time limit within which the Commissioner may not recover on his deficiency. There is no statement in the said Sections which may be construed to mean that the Court has no jurisdiction to hear a case not brought before it within ninety days.

7. That notwithstanding the fact that the Petition is entitled "Petitioners vs. The Commissioner", the Appellants are defendants in every legal sense of the word, and under the Constitution of the United States are entitled to all the rights and privileges of defendants in any other court or any other kind of case.

ARGUMENT.

1. Rule 14 (a) provides that the Commissioner shall have forty-five days in which to move in regard to the Petition, and the Motion filed herein was not made within such forty-five day limit. Rule 19 (a) provides that motions must be timely and there was, as the record will show, no extension of time granted to Appellee, pursuant to Rule 20 (a). Therefore, the

Court below erred in entertaining Appellee's Motion to Dismiss. To have refused such motion would have denied neither the taxpayers nor the Government a hearing on the merits.

2. Appellants contend that, since their Petition was filed before the Commissioner had made a legal move to recover on the alleged deficiency, they are in the same position as a defendant in a civil case who fails to answer a complaint within the statutory time but does answer before a default is entered. In which event, the matter is still before the Court for a hearing on the merits and such should be the case in the above entitled matter. To not dismiss this case and to allow it to proceed on to a hearing on its merits works no hardship on the Government since the case will be heard on its merits, and if the Government's position is sound, a recovery will be had. On the contrary, if the case is dismissed, the Appellants will have to pay a tax which may or may not be correct, and which is alleged to be arbitrary and wrong by a properly drawn, verified Petition. Such latter event is not in keeping with the United States Constitution nor any accepted tenet of American jurisprudence. The central, underlying fact and basic principle upon which our whole system of law rests is that every individual shall have a right to be heard on the merits of his case. The abandonment of the ancient forms of common law practice and pleading clearly demonstrate such a principle.

3. The Fifth Amendment to the United States Constitution provides that one shall not be deprived

of life, liberty or property without due process of law. Due process rests, fundamentally, on the right of one to have his case heard on its merits, particularly where the Government is the adverse party. The Petition alleges that the deficiency assessed by the Commissioner is arbitrary and incorrect, and for the purpose of arguing this Motion to Dismiss the allegations of the Petition must be deemed well pleaded and correct. Therefore, since we must assume the said allegations to be correct, to dismiss the case and deny the right to be heard on the merits is to force the Appellants to pay a tax which is admitted by the Commissioner to be arbitrary and incorrect. All of which is to deprive the Appellants of their property without due process of law. It is unthinkable that the Appellants should be deprived of their property by the mere passage of two days' time. Such is not the collection of taxes.

4. Every person under the Constitution is entitled to both remedial and substantive due process; and to dismiss this case at this time after it was filed before default was entered by the Commissioner making some move to recover on his assessment, is to deny the Appellants remedial due process, and since such denial will cut off Appellants' right to a hearing on the merits of this case, such dismissal will constitute a denial of substantive due process. (The legal points hereinabove set forth have been so grounded in history by the United States Supreme Court landmark cases in interpreting the Constitution that the writer does not feel it necessary to waste the Court's time by citing them here.)

The Appellants are average small town citizens, they filed their return in good faith and with the aid and assistance of an agent from the Internal Revenue Department. They, like the majority of other similarly situated persons, were not aware of the exigencies attendant upon the ninety day notice, nor was competent counsel available until the writer assumed his present position in the community, but since becoming acquainted with the necessities and their consequences, Appellants have made every effort to have their case heard on its merits.

5. It goes without saying that the Commissioner has no right to collect an admittedly arbitrary tax and for the Court to aid and abet such a collection is unlawful and unconstitutional.

6. Section 6213 of the United States Code 1954 contains no statement to the effect that a failure to file within ninety days deprives the Court of jurisdiction. It provides, in effect, that the Commissioner must wait ninety days to start collecting on his assessed deficiency. To say otherwise is to read something into the statute that is not there. Subsection (c) of the above Section provides that if the taxpayer does not file a Petition with the Tax Court within the time prescribed in Subsection (a) of the above, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed and shall be paid *upon notice and demand* from the secretary or his delegate.

The plain unequivocal law to be gained from said Section 6213 (a) and (c) is that the Commissioner must wait ninety days before proceeding to assess

the deficiency against the taxpayer and that at the end of ninety days if the taxpayer has not filed a Petition, the Commissioner must give notice and make demand for payment of said deficiency.

While it may be true that the Tax Court is an executive agency and that its jurisdiction is limited and purely statutory, the plain fact is that the statute must necessarily provide within it clearly and without mistake any such limitation claimed to be imposed by such statute. If it is possible for the Commissioner to read from the above-mentioned section that the Court is without jurisdiction after the ninetieth day, in the absence of a plain statement to that effect, it is equally reasonable for the taxpayer to say that a Petition filed after the ninetieth day and before notice and demand, preserves the Court's jurisdiction. Thus, it follows, in view of the foregoing, that the above cited Section must be construed in connection with the particular facts of the instant case. It has long been settled that where there are two possible constructions of a statute one of which would give it a constitutional effect and the other would not, the former must be adopted.

In the instant case there is an uncontroverted allegation to the effect that a clearly unlawful tax has been imposed by the deficiency filed herein and that to follow the Commissioner's construction of the above section would give such section the effect of forcing the taxpayer to pay an unlawful tax all of which is clearly in violation of the letter and the spirit of the Fifth Amendment to the United States Constitution.

In no other Court or administrative body within the structure of American jurisprudence can such a legal device as Appellee's Motion to Dismiss be used to deprive a person unlawfully of his property. If the Commissioner's case is sound the Government suffers no hardship by a hearing on the merits.

7. Since the Commissioner's case is made out *prima facie* at the time he files his ninety day notice, and since the taxpayer is under a burden to defend or be liable upon the filing of such ninety day notice, the taxpayer petitioner is clearly a defendant, and Section 6213 should be construed in the same manner and to the same effect as the Federal Rules of Civil Procedure and all doubts should be resolved in favor of the defendant.

A line of cases has recently come to the writer's attention which purport to have established the Commissioner's position as a matter of law and counsel for the Appellee will no doubt urge such cases as authority, however, it is to be pointed out that none of such cases considered the constitutional effect in a factual situation precisely similar to the case at bar.

Wherefore, Appellants pray that the decision of the United States Tax Court be set aside and the above-entitled case be remanded for hearing on its merits.

Dated, Battle Mountain, Nevada,
March 18, 1957.

GEORGE G. HOLDEN,
Attorney for Appellants.

IN THE
United States Court of Appeals
For the Ninth Circuit

ROYAL E. JORGENSEN and MARY M. JORGENSEN,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for Review of the Order of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

ELLIS N. SLACK,

LEE A. JACKSON,

CHARLES B. E. FREEMAN

Attorneys,

Department of Justice, APR 30 1957

Washington 25, D. C.

PAUL P. O'BRIEN, C.

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| Sec. 7422 (26 U.S.C. 1952 ed., Supp. II, Sec. 7422) | 9 |
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| Sec. 7502 (26 U.S.C. 1952 ed., Supp. II, Sec. 7502) | 2, 3, 4, 5, 6, 8, 10 |
| Sec. 7851 (26 U.S.C. 1952 ed., Supp. II, Sec. 7851) | 2, 5, 10 |
| 28 U.S.C., Secs. 1346, 1491 | 9 |

MISCELLANEOUS:

| | |
|--|---|
| 2 Cooley, Constitutional Limitations 760-765 (8th ed., 1927) | 8 |
| 1 Freeman, Judgments (5th ed., 1925), Secs. 288, 333, 338 .. | 8 |
| Restatement of Judgments (1942): | |
| Sec. 7 | 8 |
| Sec. 47 | 8 |
| Sec. 49 | 8 |

Rules of Practice Tax Court of the United States (Revised January 15, 1957):

| | |
|-------------------|-------|
| Rule 6 | 7, 13 |
| Rule 7 | 7, 13 |
| Rule 14 | 6, 14 |
| Rule 20 | 6, 14 |
| Rule 21 | 7, 14 |

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 15356

ROYAL E. JORGENSEN and MARY M. JORGENSEN,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for Review of the Order of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court rendered no opinion.

JURISDICTION

This case involves a deficiency in federal income taxes for the calendar year 1952. (R. 7-8.) On October 20, 1955, the Commissioner mailed to taxpayers a notice disclosing a deficiency in the amount of

\$2,917.14, plus penalties in the amount of \$439.68. (R. 8, 9.) On January 23, 1956, taxpayers filed a petition with the Tax Court for redetermination (R. 3) under the provisions of Section 272 (a)(1) of the Internal Revenue Code of 1939.¹ The order of the Tax Court dismissing taxpayers' petition was entered on April 30, 1956. (R. 12.) The case is brought to this Court by petition for review filed on July 26, 1956. (R. 3.) Jurisdiction is conferred on this Court by Section 7482, Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether filing a petition for redetermination is deemed timely under the provisions of Section 272 (a)(1) of the 1939 Code and Section 7502 (a) of the 1954 Code when the petition is mailed and the date of the United States postmark stamped on the envelope containing the petition is not within the 90-day period prescribed by Section 272 (a)(1) of the 1939 Code for filing a petition for redetermination.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent statutes and other authorities involved may be found in the Appendix, *infra*.

STATEMENT

The Commissioner determined a deficiency in taxpayers' income taxes for the calendar year 1952. (R.

¹ Section 272 (a)(1), Internal Revenue Code of 1939 is applicable because Section 7851 (a)(6) of the Internal Revenue Code of 1954 (Appendix, *infra*) continues the notice of deficiency and petition to the Tax Court procedures of Section 272 (a)(1) with respect to taxes imposed by the 1939 Code with the exception of treating timely mailing as timely filing whenever Section 7502 of the Internal Revenue Code of 1954 applies.

7-8.) A notice of deficiency was sent to taxpayers by registered mail on October 20, 1955. (R. 9.) Taxpayers' petition for redetermination was filed with the Tax Court on January 23, 1956 (R. 3), which was the 95th day after the notice of deficiency was mailed. The United States postmark stamped on the envelope containing the petition was dated January 20, 1956 (R. 9), which was the 92d day after the notice of deficiency was mailed. The 90th day after the notice of deficiency was mailed was neither a Saturday, Sunday nor legal holiday in the District of Columbia.

The Commissioner filed a motion to dismiss the petition on the ground that the Tax Court lacked jurisdiction since the taxpayers failed to file the petition for redetermination within 90 days after the notice of deficiency was mailed to them. (R. 9-10.) The Tax Court granted the Commissioner's motion (R. 12) and taxpayers appeal from this order.

SUMMARY OF ARGUMENT

In order for the Tax Court to acquire jurisdiction, a petition for redetermination must be filed with that Court within 90 days after a notice of deficiency is mailed. To file a petition with the Tax Court means actual delivery of the petition to the Tax Court. The petition in this case was delivered to the Tax Court on the 95th day after the notice of deficiency was mailed. Therefore, the petition was not filed within the prescribed 90-day period.

The undisputed facts show that Section 7502 (a) is inapplicable. That section specifically provides that it shall apply only if the postmark date stamped on the envelope containing the petition falls on or before the prescribed date for filing. Here, the date of the

postmark is two days after the expiration of the 90-day period.

Taxpayers' arguments concerning procedure and the Constitutional objections raised are without merit. Accordingly, the Tax Court correctly dismissed the petition for redetermination for lack of jurisdiction.

ARGUMENT

The Tax Court Correctly Dismissed the Petition for Redetermination for Lack of Jurisdiction Because the Petition Was Not Timely Filed in Accordance With the Provisions of Section 272 (a)(1) of the 1939 Code as Modified by Section 7502 (a) of the 1954 Code

When a deficiency is asserted by the Commissioner, taxpayer may seek a redetermination by filing a petition with the Tax Court. Section 272 (a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*). The petition must be filed within 90 days after the date a notice of deficiency is mailed. Section 272 (a)(1). Taxpayer argues that the filing requirement is not jurisdictional. (Br. 7.) However, as this Court stated in *Di Prospero v. Commissioner*, 176 F. 2d 76, 77 (C.A. 9th): "There is, at this late date, little doubt that the 90 day requirement is jurisdictional." Thus, the Tax Court did not acquire jurisdiction to redetermine the deficiency unless the petition was filed within the prescribed 90-day period. *Di Prospero v. Commissioner, supra*.

To file a petition with a Tax Court pursuant to Section 272 (a)(1) means actual delivery of the petition to the Tax Court within the prescribed 90 days.² *Di Prospero v. Commissioner, supra; Stebbins' Estate v.*

² Mailing the petition is neither delivery nor filing. *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 972 (C.A. D.C.), certiorari denied, 277 U.S. 592.

Helvering, 121 F. 2d 892 (C.A. D.C.); *Poyner v. Commissioner*, 81 F. 2d 521 (C.A. 5th). The petition in this case was not actually delivered to the Tax Court until January 23, 1956, which was the 95th day after the notice of deficiency was mailed. (R. 9.) Taxpayers' time for filing the petition expired on January 18, 1956, which was neither a Saturday, Sunday nor a legal holiday in the District of Columbia. Thus the petition in this case was not timely filed in accordance with Section 7502 (a) (1) which required actual delivery of the petition to the Tax Court within the 90-day period. *Di Prospero v. Commissioner, supra*; *Worthington v. Commissioner*, 211 F. 2d 131 (C.A. 6th); *Galvin v. Commissioner*, 239 F. 2d 166 (C.A. 2d).

Section 7502 (a) of the Internal Revenue Code of 1954³ (Appendix *infra*) temporizes the requirement of actual delivery. However, the section states:

This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, * * *.

The petition here was postmarked on January 20, 1956 (R. 9) which was the 92d day after the notice of deficiency was mailed. This was two days *after* the expiration of the prescribed 90-day period. Therefore, Section 7502(a) does not apply. *Galvin v. Commissioner, supra*; *Lingham v. Commissioner*, (C.A. 3d), decided April 10, 1957.

In the recent case of *Galvin v. Commissioner, supra*, the date of the postmark on the envelope containing

³ Section 7502(a) of the 1954 Code is effective even as to taxes imposed by the 1939 Code so long as the mailing, as here, occurred after August 16, 1954. Section 7851 (a) (6) (C) (v) (Appendix, *infra*).

taxpayer's petition for redetermination was the 91st day after the notice of deficiency was mailed. The petition was filed with the Tax Court on the 92d day after the notice of deficiency was mailed. The Court of Appeals for the Second Circuit held that Section 7502 (a) did not apply since the postmark date was not within the prescribed 90-day period. Consequently, the Tax Court was without jurisdiction since the petition was not filed within 90 days as required by Section 6213 (a) of the Internal Revenue Code of 1954.⁴ The *Galvin* case is not materially different from the present case and the Tax Court's action in the present case is consistent with the Second Circuit's holding in the *Galvin* case. Accord: *Lingham v. Commissioner, supra*.

Accordingly, the Tax Court correctly dismissed taxpayers' petition for redetermination for lack of jurisdiction because the petition was not timely filed in accordance with Section 272 (a)(1) of the 1939 Code as modified by Section 7502(a) of the 1954 Code.

Taxpayers argue that the Commissioner's motion to dismiss was not filed within 45 days after the petition for redetermination was served (Br. 4-5) but, as their citation of the Tax Court's rules show, this argument is without merit. There is no doubt that the Tax Court is authorized to promulgate its own rules of practice and procedure. Section 7453 of the Internal Revenue Code of 1954 (Appendix, *infra*). While Rule 14 (a) of the Rules of Practice, Tax Court of the United States (Appendix, *infra*) states 45 days as the time within which the Commissioner may move with respect to the petition, Rule 20 (a), Rules of

⁴ Section 6213 (a) of the 1954 Code is substantially the same as Section 272 (a)(1) of the 1939 Code which is involved here.

the Tax Court (Appendix, *infra*), permits an extension of time as the Tax Court in its discretion may decide. Taxpayers' petition was received by the Commissioner on January 24, 1956. (R. 9.) The Commissioner's motion was filed on March 19, 1956. (R. 10.) It is implicit in the Tax Court's action of granting the Commissioner's motion that the time was enlarged. In any event, the Tax Court's action is proper since it may dismiss a case upon its own motion. Rule 21, Rules of the Tax Court (Appendix, *infra*).

Taxpayers also argue that they are in the same position as a defendant in a civil case. (Br. 5, 9.) The analogy is inapposite because, in the first place, it is clear that the Commissioner is required to assess taxes imposed by the Internal Revenue Code (Section 6201 of the 1954 Code) within the period of limitations prescribed. Section 275 (a) of the 1939 Code. A notice of deficiency is a prerequisite to assessment. Section 272 (a)(1) of the 1939 Code. Taxpayer is permitted to seek a redetermination of the deficiency by filing a petition with the Tax Court. Section 272 (a)(1) of the 1939 Code. Thus, *taxpayer initiates* the proceedings in the Tax Court and becomes the *petitioner* in accordance with the Code and the Tax Court's rules. See Rules 6 and 7, Rules of the Tax Court (Appendix, *infra*). The Commissioner is the *respondent*. Rule 6, Rules of the Tax Court. No transformation occurs simply because taxpayer files a petition for redetermination after the expiration of the 90-day period.

Secondly, taxpayers' analogy of themselves to a defendant in a civil case is predicated upon the assumption that the hypothetical complaint was itself filed within the period of limitation so as to confer jurisdic-

tion upon the court.⁵ Taxpayers' petition for redetermination here was not filed within the period of limitations of 90 days so as to confer jurisdiction upon the Tax Court. Therefore, since the basic assumption upon which the analogy is predicated is not true in this case, the analogy is inapposite.⁶

The procedure in this case does not contravene basic principles of "our whole system of law" as taxpayers argue (Br. 5), for in any case an aggrieved party's remedy may be barred upon the expiration of the period of limitations within which a remedy might have been pursued. This is not a contravention of an accepted tenet; on the contrary, it is one of our accepted tenets of jurisprudence. 2 ^{Coleley} ~~Coley~~, Constitutional Limitations, 760-765 (8th ed., 1927); Restatement of Judgments (1942), Sections 47 (e), 49 (a).

Taxpayers further argue that dismissal of their petition by the Tax Court compels them to pay a tax which is arbitrary and incorrect and, since they are denied a hearing on the merits, they are thereby deprived of due process of law guaranteed by the Fifth

⁵ It necessarily follows that if the complaint was not filed within the period of limitation, the court would not have jurisdiction to determine the merits and a judgment on the merits would be void. 1 Freeman, Judgments (5th ed., 1925), Sections 288, 333, 338; Restatement of Judgments (1942), Section 7.

⁶ Taxpayers' argument with respect to hardship (Br. 5, 9) is, of course, an equitable argument. However, it is the congressional prerogative to establish the time within which a proceeding may be initiated in the Tax Court. See *Brushaber v. Union Pac. R. R.*, 240 U.S. 1; *Federal Grain Co. v. United States*, 35 F. 2d 260 (W.D. Mo.); *Vance v. Vance*, 108 U.S. 514. That time has been established in Section 272 (a) (1) of the 1939 Code as modified by Section 7502 (a) of the 1954 Code which does not permit an extension predicated upon either the presence or absence of hardship.

Amendment to the Constitution of the United States. (Br. 5-7.) This argument is plainly without merit since a proceeding in the Tax Court is not taxpayers' single recourse. See Sections 322 (b)(1) and 3772 (a)(2) of the 1939 Code and Section 7422 (a) of the 1954 Code. See also 28 U.S.C., Sections 1346 (a), 1491.

CONCLUSION

The absence of timely filing prevented the Tax Court from acquiring jurisdiction. Consequently, taxpayers' petition for redetermination was properly dismissed and the order of the Tax Court should be affirmed.

Respectfully submitted,

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APRIL, 1957

APPENDIX

INTERNAL REVENUE CODE OF 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

INTERNAL REVENUE CODE OF 1954:

SEC. 7453. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe * * *.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7453.)

SEC. 7502. TIMELY MAILING TREATED AS TIMELY FILING.

(a) *General Rule*.—If any claim, statement, or other document (other than a return or other document required under authority of chapter 61), required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such claim, statement, or other document is required to be filed, the date of the United States postmark stamped on the cover in which such claim, statement, or other document is mailed shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, determined with regard to any extension granted for such filing, and only if the claim, statement, or other document was, within the prescribed time, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, office, or officer with which the claim, statement, or other document is required to be filed.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7502.)

SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules*.—Except as otherwise provided in any section of this title—

* * * *

(6) *Subtitle F*.—

(A) *General rule*.—The provisions of subtitle F shall take effect on the day after the date of enactment of this title and shall be applicable with respect to any tax imposed by this title. The pro-

visions of subtitle F shall apply with respect to any tax imposed by the Internal Revenue Code of 1939 only to the extent provided in subparagraphs (B) and (C) of this paragraph.

(B) *Assessment, collection, and refunds.*—Notwithstanding the provisions of subparagraph (A), and notwithstanding any contrary provision of subchapter A of chapter 63 (relating to assessment), chapter 64 (relating to collection), or chapter 65 (relating to abatements, credits, and refunds) of this title, the provisions of part II of subchapter A of chapter 28 and chapters 35, 36, and 37 (except section 3777) of subtitle D of the Internal Revenue Code of 1939 shall remain in effect until January 1, 1955, and shall also be applicable to the taxes imposed by this title. On and after January 1, 1955, the provisions of subchapter A of chapter 63, chapter 64, and chapter 65 (except section 6405) of this title shall be applicable to all internal revenue taxes (whether imposed by this title or by the Internal Revenue Code of 1939), * * *.

(C) *Taxes imposed under the 1939 Code.*—After the date of enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939, notwithstanding any contrary provisions of such code:

* * * *

(iv) Chapter 76, relating to judicial proceedings.

(v) Chapter 77, relating to miscellaneous provisions, except that section 7502 shall apply only if the mailing occurs after the date of enactment of this title, and section 7503 shall apply only if the last date referred to therein occurs after the date of enactment of this title.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7851.)

RULES OF PRACTICE TAX COURT OF THE UNITED STATES
(Revised January 15, 1957):

RULE 6. PROPER PARTIES

A case in the Tax Court shall be brought by and in the name of the person against whom the Commissioner determined the deficiency (or liability, as the case may be), or by and in the full descriptive name of the fiduciary legally entitled to institute a case on behalf of such person.

* * * *

The Commissioner shall be named as the respondent.

RULE 7. INITIATION OF A CASE—PETITION—FILING
FEE—FORM

(a) *Petition.*—

(1) *Filing.*—A case shall be initiated by filing with the Court a petition consisting of an original and 4 complete, accurately conformed, clear copies, either printed or typed. (See Rules 4 and 6.)

* * * *

Petition

(B) Numbered paragraphs stating:

1. Petitioner's name and principal office or residence, and the office of the director or district director of internal revenue in which the tax return for the period in controversy was filed.

* * * *

6. A prayer, setting forth relief sought by the petitioner.

(C) The signature of the petitioner or that of his counsel. (See Rule 4 (f).)

(D) A verification by the petitioner; * * *

* * * *

RULE 14. ANSWER

(a) *Time to answer or move.*—The Commissioner, after service upon him of the petition, shall have 60 days within which to file an answer or 45 days within which to move with respect to the petition.
* * *

* * * *

RULE 20. EXTENSIONS OF TIME

(a) An extension of time (except for the absolute time limit on filing of the petition, see section 6213 (a), Code of 1954, and except as otherwise provided in these Rules) may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth good and sufficient cause therefor or may be ordered by the Court upon its own motion.

* * * *

RULE 21. DISMISSAL

A case may be dismissed for cause upon motion of either party or of the Court. * * *

United States
Court of Appeals
For the Ninth Circuit

JOAN HESS,
Appellant,
vs.

E. B. BENNETT and JACK E. BENNETT, doing
business as E. B. BENNETT & SON, and MARION
M. HUGHES,
Appellees.

Appellees' Brief

Appeal from the United States District Court
for the District of Oregon

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FILED

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PAUL P. O'BRIEN, CLERK

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United States
Court of Appeals
For the Ninth Circuit

JOAN HESS,
Appellant,

vs.

E. B. BENNETT and JACK E. BENNETT, doing
business as E. B. BENNETT & SON, and MARION
M. HUGHES,

Appellees.

Appellees' Brief

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF JURISDICTION

Plaintiff brought this action against defendants, based upon diversity of citizenship, for personal injuries incurred while plaintiff was a passenger in an automobile driven by defendant Marion Hughes and owned by defendants Bennett.

INTRODUCTION

The jury returned a verdict in favor of the defendants and the appellant contends that there were

three errors committed by the Court in the trial: (1) the instructing of the jury on the defenses of contributory negligence and assumption of risk; (2) the removal by the Court of the matter of the condition of the car door as it related to the gross negligence of the appellee Hughes; (3) the refusing to give certain requested instructions concerning the car door condition as it related to the gross negligence of appellee Hughes.

STATEMENT OF THE CASE

E. B. Bennett and Jack E. Bennett were doing business in the City of Burns, Oregon, as E. B. Bennett & Son (Tr. II, 64, 68) and had as one of their employees, Marion M. Hughes (Tr. II, 34). On the day in question Hughes was authorized by his employers to take a certain 1949 Mercury, owned by Bennetts, from Burns, Oregon, and deliver the same to Portland, Oregon (Tr. II, 35). Hughes, with the permission of E. B. Bennett and Jack E. Bennett, invited his sister, Joan Hess and Jerry Hess, her husband, to accompany him on the trip to Portland (Tr. II, 36). Some weeks prior to this trip Hughes had driven the car on another trip upon which he had had trouble with the door on the driver's side, and had to tie it shut (Tr. II, 37). Thereafter, a new latch was placed in the door by defendants Bennetts' mechanic at their garage (Tr. II, 66).

On the day in question the trio, composed of Hughes driving, Joan Hess, and her husband Jerry Hess, left Burns for Portland, Oregon (Tr. II, 5, 38, 39). En route there was some difficulty with the latch on the door in getting the door closed (Tr. II, 5, 6, 39, 40, 50, 51). After driving for a period of time Hughes allowed Joan Hess's husband to drive the automobile on toward Salem (Tr. II, 7). En route to Salem the husband of Joan Hess was stopped by a State Police officer and taken to Salem (Tr. II, 7). There they were cautioned to drive more carefully (Tr. II, 7). From Salem Hughes resumed the driving of the automobile (Tr. II, 7). Although there was testimony to the contrary, the plaintiff admitted that Hughes was merely trying to keep up with traffic and that while passing another car, the other car would not let him return to his own side of the road and that he got excited (Tr. II, 29, 30), and that when he started back into his own lane the car went into a skid (Tr. II, 15, 29, 30).

ARGUMENT

It was the contention of appellees at the conclusion of the plaintiff's case that the appellant had shown no right to recover because there was no evidence of gross negligence on the part of appellees. (Defendants' Motion for Dismissal, Tr. II, 60). The Court overruled the Motion at that time with the thought of giving it further consideration, feeling

that there was slight, if any, evidence of gross negligence (Tr. II, 63).

The Motion was renewed at the close of all of the evidence (Tr. II, 72), but the Court submitted the case to the jury, which returned its verdict in favor of appellees. By its verdict the jury confirmed what appeared as a matter of law from the evidence, i.e. that there was no gross negligence.

Plaintiff, herself, testified at the trial as follows (Tr. II, 29, 30):

“Q. I will ask you, referring to page 10, at the time this deposition was taken, if I asked this question. ‘Then as you left Salem, he was proceeding along with the rest of the traffic, would that be a correct statement?’ Answer, ‘yes’. Were you asked that question and did you make that answer?

A. Yes.

Q. Now, when he went to pass this car, whichever car it was that he was passing, they wouldn’t let him back into line, is that correct?

A. I don’t remember at the time.

Q. I will ask you, look at page 10, — if you were not asked this question, ‘And he came out and started to pass the car but there was a truck coming, is that correct?’ Answer, ‘He was too far, you know, as he started passing the car he couldn’t have swerved back in in time be-

cause they were all going and they wouldn't let him in, see.' Were you asked that question and did you give that answer?

A. Yes.

Q. Under the situation as it was then you felt it was only natural that he got excited, is that correct?

A. Yes, — well, I got excited myself.

Q. Isn't it a fact that you testified that he got excited and that it was natural, anyone would under the circumstances there?

A. Yes."

This testimony of the plaintiff is binding upon her, the Court and the jury, and precludes a recovery for gross negligence.

The Oregon Supreme Court, in discussing the binding effect of the admissions of the plaintiff to a cause of action, in the case of *Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co.*, 145 Or. 96, 25 P. (2d) 911, said on page 113:

"The admissions made by a party to a legal controversy stand upon a different footing from those made by an ordinary witness. The officers of the defendant corporation represent the corporation. The admissions by a party made intelligently are judicial admissions which are binding upon the court and the parties, and the jury and the court should take

them as true. 22 C.J. 329, §370; *Connor v. Lake Shore & M.C. Ry. Co.*, 168 Mich. 29 (133 N.W. 1003); *Cogan v. Cass Ave. & F. G. Ry. Co.*, 101 Mo. App. 179 (73 S.W. 738)."

Under the Oregon Guest Passenger Statute, it is necessary that a guest-passenger prove that the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others, (O.R.S. 30.110) and in this case the plaintiff has sought to rely upon the alleged gross negligence of the defendant, Hughes.

The most recent Oregon case which involved the question of whether a host's conduct in operating a motor vehicle amounted to gross negligence was *Whang v. Hong*, 61 Or. Adv. 589, 290 P. (2d) 185. In that case there was testimony that the defendant approached a dangerous intersection at 30 to 35 miles per hour, that he saw the other car involved when he was 20 or 25 feet from the intersection and the other car 75 feet away, and that he thought the other car would stop and "continued right on".

The jury returned a verdict in favor of the parent of the deceased guest, a nine year old son, and the Oregon Supreme Court reversed, holding that the trial judge should have directed a verdict in favor of the defendant; following the Oregon rule that mere inadvertence, thoughtlessness, brief inattention,

error in judgment and momentary loss of presence of mind do not constitute gross negligence (61 Or. Adv. at p. 592).

In this case Hughes was proceeding along with the rest of the traffic, came out to pass a car, saw a big truck coming but was prevented from returning to his own lane of traffic by another car (Tr. II, 30). He got panicky and threw on the brakes and tried to get back in his own lane (Tr. II, 14) and the car skidded down the highway sideways, the door opened and plaintiff and her brother went out (Tr. II, 15).

There was other testimony concerning the manner in which Hughes drove but these were plaintiff's own admissions and are binding upon her as pointed out above.

In the Oregon case of *Baird v. Boyer, et al*, 187 Or. 131, 210 P. (2d) 118, there was evidence that the defendant host was driving down a ten per cent grade bridge ramp in the city of Portland at a speed of 40 to 60 miles per hour and that the indicated speed was 20 miles per hour. He started speeding up and when the plaintiff guest warned him that he was about to hit a truck, said "I know it", slammed on his brakes and hit the truck.

It was held that this did not amount to gross negligence and that the defendant host's motion for judgment notwithstanding the verdict was

properly allowed. Significantly, in the Baird case, the plaintiff himself testified that the host's car was "moving along with the rest of the traffic" (p. 134).

So in this case there was no basis for submitting the issue of gross negligence to the jury, and appellant's case in being submitted to the jury, was given more consideration than that to which it was actually entitled. The questions raised by appellant on this appeal, therefore, are moot, but will be briefly answered in any event.

SPECIFICATION OF ERROR NO. 1

That the Court erred in instructing the jury on the defenses of contributory negligence and assumption of risk. The instruction which is objected to is set out in the appellant's Brief at p. 4.

Appellees contend that the instructions to the jury must be taken as a whole, and that this instruction, taken with the instruction on page 80, Transcript II, does in fact give a correct statement of the law of Oregon as to the duty of a guest-passenger. On page 80 of the transcript the Court says:

"* * * Ordinary negligence is the failure to do that which an ordinary prudent person would have done or the doing of something which an ordinary prudent person would not have done under the same or similar circumstances. In other words, ordinary negligence is the mere failure to exercise reasonable care."

This statement, when taken together with the statements regarding the duty of a non-paying guest to avoid negligence, do in effect give the proper requirements and duties of the guest-passenger in order to protect themselves from being contributorily negligent.

In the case of *Elling v. Blake-McFall Co.*, 85 Or. 91, 166 Pac. 57, an instruction given the lower court was affirmed by the Supreme Court of the State of Oregon. The instruction at page 97, was as follows:

“ ‘The plaintiff in this case was required to exercise reasonable care; that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so.’

“We find no request for any more specific or different instruction upon this point. The law was given to the jury substantially as announced in *Rogers v. Portland Ry. L. & P. Co.*, 66 Or. 244, 251 (134 Pac. 9); and in *Tonseth v. Portland Ry. L. & P. Co.*, 70 Or. 341 (141 Pac. 868).”

In light of the *Elling v. Blake-McFall* case, *supra*, and *Hunt v. Portland Baseball Club*, 62 Or. Adv. 805, 296 P. (2d) 495, the instruction given was a proper statement of the law of the State of Oregon.

In the *Hunt* case the Oregon Supreme Court specifically recognizes that this is the law in Oregon:

“ * * * O.R.S. 30.110 and 30.120, which prevent a non-paying guest from recovering damages from his host in automobile and airplane accidents, unless the guest can prove evil intention, gross negligence or intoxication, denote a social policy that one who voluntarily exposes himself to a known danger should be held to have assumed the risks thereof.”

In *Adair, Adm. v. Valley Flying Service*, 196 Or. 479, 250 P. (2d) 104, it was held that a complaint alleging that defendant had rented an airplane to a companion of plaintiff's decedent when he was obviously intoxicated, did not state a cause of action and barred a recovery as a matter of law, since it showed on its face that plaintiff's decedent was guilty of contributory negligence as a matter of

law in getting into the airplane with one in the alleged condition.

PART 2 OF APPELLANT'S SPECIFICATION OF ERROR NO. 1

As a further ground, appellant contends that the Court should not have instructed the jury as to the issues of contributory negligence and assumption of risk when they were not affirmatively pleaded by the defendants.

Rule 15(b) of the Federal Rules of Civil Procedure, provides in part as follows:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings * * *”

Under this rule, the Court committed no error in instructing the jury as to contributory negligence or assumption of risk since the parties during the course of the trial did, in fact, treat these two issues as being a part of the case. (Tr. II, 62, 63, 90).

“MR. COSGRAVE. The defendants have no exceptions. I will say with respect to the assumption of risk, — under the Federal Rules, it is my understanding that any issue which is treated by the parties as being before the Court can properly be presented to the jury. It is my understanding that even prior to the completion of all the testimony in this case the matter of

the assumption of risk was argued by counsel to the Court in chambers and the case has been treated at all times as though that was an issue.

THE COURT. Yes, I think that is correct and the evidence was introduced here on that."

SPECIFICATION OF ERROR NO. 2

Withdrawal of the charge of negligence in connection with the catch on the car door.

There was no evidence that this car door had ever opened while the car was being operated; the only trouble was in getting it closed (Tr. II, 47, 50). Nor was there any evidence that any condition of the door caused it to open during the accident. Further, the undisputed evidence was that appellees had repaired the door by installing a new door latch, (Def. Ex. 6, Tr. II, 64, 65, 67).

Since there was no evidence of any negligence in this respect, the Court very properly removed this issue from the jury's consideration.

SPECIFICATION OF ERROR NO. 3

The refusal to give the plaintiff's requested instructions concerning the car door.

The instructions requested were purely and simply an argument with respect to the circumstance of the car door which appellant requested the Court to make. Although a District Judge may com-

ment on the evidence, we know of no rule which makes it error for a judge to refuse to emphasize a particular phase of the case by an argumentative instruction.

Respectfully submitted,

WALTER J. COSGRAVE,
723 Pittock Block,
Portland 5, Oregon,
Attorney for Appellees.

Of Counsel:

Maguire, Shields, Morrison & Bailey,
723 Pittock Block,
Portland 5, Oregon.

No. 15360

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

MAUD L. ELFER,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JAN 24 1957

PAUL P. O'BRIEN, C

No. 15360

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MAUD L. ELFER,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS

Counsel for Appellants, United States of America:

CHARLES P. MORIARTY,

United States Attorney;

EDWARD J. McCORMICK, JR.,

Assistant United States Attorney;

RICHARD F. BROZ,

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Seattle 4, Washington.

Counsel for Appellee, Maud L. Elfer:

RICHARD F. SCHACHT,

Matheson Building,

Mount Vernon, Washington.

United States District Court, Western District
of Washington, Northern Division

No. 150

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAUD L. ELFER,

Defendant.

COMPLAINT

Comes now the United States of America by and through Charles P. Moriarty, United States Attorney, Western District of Washington, and Edward J. McCormick, Jr., Assistant United States Attorney, and for cause of action against the defendant herein complains and alleges as follows:

I.

Jurisdiction lies under 28 U.S.C. 1345. Defendant resides at LaConner in the Northern Division of the Western District of Washington.

II.

Prior to and including the month of June, 1943, the defendant Maud L. Elfer was the wife of a member of the United States naval forces and receiving family allowance as wife in the sum of fifty dollars (\$50.00) per month under the provisions of the Servicemen's Dependents Allowance Act of 1942 (56 Stat. 381). In the month of June, 1943, Kenneth H. Schlafer, the serviceman by reason of whose

Kenneth H. Schlafer and as such said parties constituted a marital community under the laws of the State of Washington. That the indebtedness claimed in Plaintiff's complaint, if it be an indebtedness, is one as against the then marital community composed of the Defendant and Kenneth H. Schlafer, at the time of said payments, and was not a personal debt of or claim against the Defendant.

Third Defense

I.

If Defendant is indebted to Plaintiff for the moneys claimed in its Complaint, she is indebted to it jointly with Kenneth H. Schlafer. Kenneth H. Schlafer is alive; is a citizen of the State of Washington and a resident of this district, and is subject to the jurisdiction of this Court, as to both service of process and venue; can be made a party without depriving this Court of jurisdiction of the present parties, and has not been made a party.

* * *

Wherefore Defendant prays that Plaintiff's complaint be dismissed and that it take nothing thereunder, and Defendant recover her costs and disbursements herein.

/s/ RICHARD F. SCHACHT,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

**MOTION TO STRIKE AFFIRMATIVE
DEFENSES**

Comes Now the United States of America, by and through Charles P. Moriarty, United States Attorney for the Western District of Washington, and Edward J. McCormick, Jr., Assistant United States Attorney for said district, and moves to strike Defendant's Second, Third and Fourth Defenses as being insufficient in law. This motion is based upon the pleadings on file herein and Memorandum submitted herewith.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter coming on regularly for hearing this day before the undersigned Judge of the above-entitled Court, the Plaintiff being represented by Edward J. McCormick, Jr., Assistant United States Attorney for the Western District of Washington, and the Defendant, Maud L. Elfer, being present and being represented by Richard F. Schacht, her

attorney, and argument having been made on Plaintiff's motion to strike Defendant's second, third and fourth affirmative defenses and the Court having denied the motions with leave to renew at the conclusion of trial and the trial of the cause proceeding, evidence having been introduced and both sides having rested, and argument presented, and the Court having sustained Plaintiff's motion to strike Defendant's fourth affirmative defense, the Court now makes the following:

Findings of Fact

I.

Defendant, Maud L. Elfer, resides at LaConner, in the Northern Division of the Western District of Washington.

II.

Defendant, Maud L. Elfer, was married in 1930 to one Kenneth Schlafer. On June 19, 1942, the said Kenneth Schlafer enlisted in the United States Naval Reserve. On June 25, 1942, Kenneth Schlafer was called to and reported for active duty in the United States Navy. Following his reporting for active duty the Defendant, Maud L. Elfer, then Maud Schlafer, began receiving and continued to receive a family allowance as wife in the sum of \$50.00 per month under the provisions of the Servicemen's Dependents Allowance Act of 1942 (56 Stat. 381). In July, 1943, Kenneth Schlafer was promoted to the grade of Boatswain Mate 2nd Class in the United States Navy. Said grade of Boatswain Mate 2nd Class was one of the first three pay grades

within the meeting of the Servicemen's Dependents Assistance Allowance Act of 1942. Thereafter, from July, 1943, to and including May, 1945, for a period of twenty-three months, the dependent's assistance allowances continued to be paid to the said Maud L. Elfer, then Maud Schlafer, at the rate of \$50.00 per month, the total payments of \$1,150.00.

III.

That on May 5, 1947, the said Maud L. Elfer, then Maud Schlafer, and Kenneth Schlafer were divorced by decree of the Superior Court of Skagit County, said final divorce decree being granted and being effective on that day, to wit: May 5, 1947.

IV.

That the said Kenneth Schlafer still resides at Samish Island, Skagit County, Washington, within the Northern Division of the Western District of Washington.

Done in Open Court this 11th day of July, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the subject matter and the party, said Maud L. Elfer, to this action.

II.

That the payments hereinbefore detailed under the dependents assistance allowance act of 1942 were, notwithstanding the title of the said Act and the fact that under Section 101 of said Act it is recited that the payments shall be made to dependents, were made to the marital community composed of Kenneth Schlafer and Maud Schlafer and were made as compensation in part for the military services of the said Kenneth Schlafer in the United States Navy and as such constituted community income.

III.

That the payments of \$50.00 per month from July, 1943, to and including May, 1945, for a period of twenty-three months or a total payment of \$1,150.00 were made to the marital community of Kenneth Schlafer and Maud Schlafer in violation of law, inasmuch as Kenneth Schlafer in June, 1943, had been promoted to a non-commissioned grade in the United States Navy to which grade no such family allowance entitlement appertained.

IV.

That Plaintiff has failed to join in this action as a party defendant the said Kenneth Schlafer and that for non-joinder of party defendants this action should be dismissed.

Done in Open Court this 11th day of July, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and approved by:

/s/ RICHARD F. SCHACHT,
Attorney for Defendant.

Approved for entry by:

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
for the Plaintiff.

[Endorsed]: Filed July 11, 1956.

United States District Court, Western District
of Washington, Northern Division

No. 150

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAUD L. ELFER,
Defendant.

JUDGMENT

This matter coming on regularly for trial on the 5th day of July, 1956, and the Court having made and entered its Findings of Fact and Conclusions of Law, and in accordance therewith.

It Is Therefore Ordered that Plaintiff's cause of action be and the same is hereby dismissed without costs to either party.

Done in Open Court this 11th day of July, 1956.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ RICHARD F. SCHACHT,
Attorney for the Defendant.

Approved for entry by:

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
for the Plaintiff.

[Endorsed]: Filed July 11, 1956.

Entered July 12, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff herein, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered in the above-entitled cause on the 11th day of July, 1956.

Dated this 5th day of September, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney.

[Endorsed]: Filed September 7, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the following original documents and papers in the file dealing with the above cause as the record on appeal herein from the judgment filed July 11, 1956, and entered July 12, 1956, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Complaint, filed June 3, 1955.
2. Summons with Marshal's return thereon, filed June 17, 1955.
3. Notice of appearance, filed June 29, 1955.
4. Answer, filed September 8, 1955.
5. Plaintiff's request for admissions, filed April 6, 1956.
6. Affidavit of service by mail, filed April 6, 1956.
7. Motion to strike affirmative defenses, filed May 26, 1956.

8. Plaintiff's memorandum in support of motion to strike affirmative defenses, filed May 26, 1956.

9. Affidavit of service by mail, filed May 26, 1956.

10. Plaintiff's supplemental memo in support of motion to strike affirmative defenses, filed June 7, 1956.

11. Notice of motion to strike defenses, filed June 7, 1956.

12. Affidavit of service by mail, filed June 7, 1956.

13. Defendant's memorandum of authorities in defense of plaintiff's motion to strike, filed June 29, 1956.

14. Findings of Fact and Conclusions of Law, filed July 11, 1956.

15. Judgment, filed July 11, 1956.

16. Notice of appeal, filed September 7, 1956.

17. Motion to extend the time for filing record on appeal and docketing, filed October 4, 1956.

18. Order extending time for filing record and docketing appeal, filed October 4, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00. I further certify that the above costs have not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 8th day of November, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ MARJORIE J. EDQUIST,
Deputy Clerk.

[Endorsed]: No. 15360. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Maud L. Elfer, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: November 13, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15360

UNITED STATES OF AMERICA,

Appellant,

vs.

MAUD L. ELFER,

Appellee.

CONCISE STATEMENT OF POINTS

On appeal herein to the United States Court of Appeals for the Ninth Circuit, appellant United States of America, relies on the following points:

1. The District Court erred in denying plaintiff's motion to strike defendant's Second and Third Affirmative Defenses.

2. The District Court erred in holding that payments made in error and in violation of law to a member of a marital community were made to the marital community.

3. The District Court erred in holding that payments made in error and in violation of law to the female member of a marital community were made as compensation in part for military services of the male member of the marital community and as such constituted community income.

4. The Findings of Fact do not support the II and III Conclusions of Law.

5. The District Court erred in holding that Kenneth Schlafer was a necessary and indispensable party to the trial court proceedings.

6. The District Court erred in entering judgment of dismissal for failure to join a necessary and indispensable party.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed December 5, 1956.

No. 15360

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

MAUD L. ELFER,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

EDWARD J. McCORMICK, JR.
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON



IN THE
United States
Court of Appeals
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UNITED STATES OF AMERICA,
Appellant,

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE JOHN C. BOWEN, *Judge*

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

MAUD L. ELFER,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction lay in the District Court under 28 U.S.C. 1345 and lies in this court under 28 U.S.C. 1291.

LEGAL STATUS OF FAMILY ALLOWANCES

This section is set out, not from the standpoint of argument, but simply to provide a readily under-

stood explanation of the status of Class F family allowances, a subject which has been the subject of little litigation, and will serve to clarify the Statement of the Case.

Historically, officers of the armed services have been "entitled" to be married, that is, upon marrying their *pay* remained the same as their bachelor opposite number but their *allowances* were increased. Where in bachelorhood they had been entitled to the money value of one ration (or to be furnished food in specie), upon marriage they became entitled to two rations. Similarly, as bachelors they were furnished in specie a room in barracks but upon marriage became entitled to larger, married quarters or, in the alternative, a fixed sum of money in lieu thereof. A similar rule prevailed as to enlisted men of the "first three grades", that is, (in the Navy) Chief Petty Officer, Petty Officer First Class and Petty Officer Second Class. These allowances were limited to the "first three grades" who were (rightly, or not) considered to be the mature career men of the enlisted corps.

The lower grades of enlisted personnel were not "entitled" to be married. The cognizance taken by the armed forces of such unauthorized marriages varied from time to time. In some cases the armed forces

took active disciplinary action, in some re-enlistment was denied, and in some the marriage was simply ignored. In any event, when a man of the "last four grades" married, the United States gave him no assistance and his family lived on his un-augmented salary.

This was the situation at the time of the Pay Readjustment Act of 1942, June 16, 1942 (56 Stat. 359), which provided in Section 9 (at 363) for pay of the enlisted grades and in Section 10 (at 364, line 8 *et seq*), "Each enlisted man of the first, second, or third grade, in the active . . . service of the United States having a dependent . . . shall . . . be entitled to receive . . . the monthly allowance for quarters authorized by law. . . ." The sums were fixed and the number of dependents had no bearing on them. No provision was made in this act for dependency allowances for the last four grades.

Seven days after the passage of the aforementioned act, on June 23, 1942, the Servicemen's Dependents Allowance Act of 1942 (56 Stat. 381) was passed. This provided in Section 101 (at 381), "The dependent . . . of any enlisted man of the fourth, fifth, sixth, or seventh grades . . . shall be entitled to receive a monthly family allowance. . . ." The remainder of the act was filled with detail which, for discussion purpose,

may be summarized as (a) the allowance was to be a sum sent to the dependent and composed of a compulsory deduction from the serviceman's pay, plus an augmentation by the United States, and (b) varied upward with the number of dependents.

One financial inequity became apparent in this law. Since the family allowances (56 Stat. 381) varied upward with the number of dependents, while the quarters allowance (56 Stat. 359) did not, it was possible for an enlisted man with several children to actually lose money by promotion to the first three grades for he would begin to draw the fixed allowance which might be, and frequently was, less than the variable allowance based on several children.

This led to an amendment in the Act of October 26, 1943 (57 Stat. 577), which provided (at 579), "An enlisted man who . . . is receiving . . . quarters [allowance] . . . may, at his option, . . . continue to receive such [quarters] . . . allowance or elect not to receive such montetary [quarters] allowance and to have his dependents become entitled to receive family allowance. . . ."

This amendment cleared the way for the enlisted man upon promotion to, *at his option*, continue his better financial position under the family allowance system rather than the quarters allowance which

would otherwise be in effect automatically. Against this background of law we must assess the facts in this case.

STATEMENT OF THE CASE

Appellee was at all times pertinent to this action the wife of a member of the armed forces during World War II. As such she was, during an early period, entitled to "Class F allowances" paid under the Servicemen's Dependents Allowance Act of 1942 (56 Stat. 381) and it is for the recovery of a later erroneous payment of similar money that this action was brought. Specifically, appellee was paid such allowances for a period of time before June 1943 at the basic (there being no children involved) rate of \$50.00 per month and concerning such payments no question is raised. From June 1943 to and including May 1945 the payments continued and \$1150.00 was paid to appellee during this period of time.

The last mentioned payments totaling \$1150.00 were made in violation of law (Conclusion of Law III, R. 10) as the then-husband of the appellee had been promoted to a grade to which no such allowances pertained, quarters allowance being paid.

The then-husband of appellee drew (for all that the record reveals) his full pay and quarters allow-

ance during the latter period of time. The then-husband never exercised his option to waive quarters allowance pertaining to his grade and continued to have his dependent draw family allowance.

Appellee was between May 1945 and the commencement of this action divorced from the person (Kenneth Schlafer), whose service in the armed forces has been above referred to, and is now married to a man named Elfer, and it was under this name that the action was brought.

The United States seeks judgment against appellee separately and not as a member of a marital community under the laws of the State of Washington. The above recital as to divorce and re-marriage is not deemed significant legally but is set forth to resolve confusion in names, etc.

QUESTIONS ON APPEAL

Appellant contends that the District Court erred in:

I.

Holding that the erroneous payments in question were made solely to the marital community of defendant and her former husband and not to defendant separately.

II.

Holding that payments made in error and in violation of law were made as compensation for military services and constituted community income.

III.

Holding that Kenneth Schlafer was a necessary and indispensable party to the action and in dismissing the action for failure to join said Kenneth Schlafer.

ARGUMENT AND AUTHORITIES

I.

In arguing that the erroneous payments were made to the wife (appellee) and not to the marital community and therefore a separate judgment should be rendered against the wife, we have been unsuccessful in finding authority. We proceed on what we consider to be a logical basis, to wit:

a. The intention of the donor is material in ascertaining the identity of the donee if an ambiguity exist. Family allowances are a gift or gratuity. The intended donee is the dependent. Under Washington law a gift to the wife is her separate property. Therefore, even had these payments been lawful, the wife received them as her separate property.

b. If overpayments were made, an implied contract to repay arose.

c. Any obligation of the wife to repay is her separate obligation.

d. Even if the wife received such payments on behalf of the community, she has a separate obligation to repay as an agent.

In support of the above reasoning we offer:

a. What was the intention of the United States? It was clearly to make a gratuitous payment *to the dependent* of the military man. Portions of the pertinent law (56 Stat. 381) are quoted:

“Sec. 101. The dependent . . . shall be entitled to receive a monthly family allowance

“Sec. 102. The . . . allowance . . . shall consist of the *Government's contribution* [Italics supplied] to such allowance and the reduction in or charge to the pay of such enlisted man.

“Sec. 115. The . . . allowances . . . shall not be assignable; shall not be subject to the claims of creditors of any person to whom or on behalf of whom they are paid”

The very title of the act states as its purpose “To provide family allowances *for the dependents* [Italics supplied] of enlisted men of the . . . Navy”

It could scarcely be clearer that the United States intended to make the relationship one between the

donor and dependent-donee. This becomes even clearer when the act relating to allowances for the first three grades is read in parallel. That act, passed by the same Congress *seven days earlier* said (56 Stat. 359 at 364) that a *first three grader* with dependent should be entitled to extra money. Instant act said that *dependents* of last four graders should be entitled to money. It should be beyond question that family allowances were paid to the dependent by the sovereign and the military man's only connection with the matter was a concurrent deduction from his pay.

By the same token, the United States did not impose an income tax on the Government's contribution to the family allowance, considering it "in the nature of a gift by the Government." Internal Revenue Cumulative Bulletin 1942 - 2, page 53. Clearly all indications of intention on the part of the donor, United States, show that such payments were gifts to the receiving dependent.

The Ninth Circuit case of *Hatch v. Ferguson* (D.C. - Wash., 1895), 68 Fed. 43, is somewhat in point here. The court construed the Washington community property status of a land-grant for service in the Mexican War. It was held to be separate property, having been donated by reason of service while a single man, but it was said in dictum (at 49), "But, even

if the marriage . . . had taken place [earlier] . . . The warrant was a gift, and, as such, was the separate property of the donee”

To a like effect see *Johnson v. Johnson* (Texas), 23 S.W. 1022 (1893), where the court said “but our holding is put on the ground that the pension is purely a gift from the government, and as such is separate property”

It would appear, therefore, that *gratuities* by the United States *on account of service* are separate property although *payments for service* may be community property.

Washington law (R.C.W. 26.16.020) provides: “The property . . . of every married woman . . . acquired by gift [shall be her separate property]”

b. It being established without contest that there were overpayments by mistake, it follows that an implied contract to repay arose, 4 Am. Jur., *Assumpsit*, § 20 and § 24.

c. It necessarily follows that such an implied contract has, as its obligor, the person who received the money, to wit, the dependent.

d. Even if it be held that appellee received the overpayment in question as the agent of the then marital community, it does not relieve her of responsibility

for repayment. The vast preponderance of community property cases deal with an attempt to impose liability on the marital community for the act of one of the spouses. This is quite natural for in community property states it is all too often the case that one of the spouses has committed an act which clearly imposes liability on him. He has no separate income, however, and if the plaintiff is to recover at all, he must *additionally* impose a liability on the community. Hence the never-ending struggle by counsel and the courts to find some benefit to the community from the act which may result in imposing such liability. But we must not lose sight of the fact that this community liability is *in addition to* the liability of the obligor or tort-feasor member of the community. To put it another way appellant feels that there is no such thing as *pure community liability* in tort or contract. It can only arise because there is also an individual liability on the part of a community member (normally the husband) which is passed along to the community under either the rule of *respondeat superior* or agency. While the expression "agent of the community" is used many times in the law of community property, it should be noted that the agent relationship is not quite that of an agent who functions separately from his principal. In community property, the agent (more normally the husband) is the agent for the community because he is a member

of the community. In a very limited sense he acts as one of a partnership.

In this sense Mrs. Elfer may be said to have received the overpayments without authority. The community/partnership could not, of course, give her authority to receive money paid in violation of law. The fact that she may afterward have used such money for a community purpose cannot avoid her personal, separate liability to repay the same. Were the marital community still in existence, the appellant might have an additional party defendant available on the theory of participation in benefits. But this can in no way limit appellant's rights against the basic obligor on the contract to repay, the appellee herein.

Indicative of the state of the law on this point is that we have not found any case under the laws of Washington paralleling the contention of appellee in this case, *i.e.*, that the wife's personal separate liability, if it exist, becomes merged into that of the community to the extent that she is personally exonerated.

R.C.W. 26.16.170 states, "Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner, as if she were unmarried." We find no reason for excepting an implied contract to return money from this general rule.

Most of the cases decided under this statute and its predecessors have dealt with written contracts to which the wife's name was signed. They cause little difficulty, the courts holding universally that the signing of the separate name evinced an intention to become separately liable, *e.g.*, *Karatofski v. Hampton*, 135 Wash. 139, 237 Pac. 17 (1925).

We are mindful, however, that here we deal with an implied contract for the return of money had and received and while we see no reason for differentiating such a case from a written contract, we turn to the case of *Paccos v. Rosenthal*, 137 Wash. 423, 242 Pac. 651 (1926), which we believe to be in point.

One Paccos loaned Rosenthal a sum of money for Rosenthal's cash bail. Later Rosenthal succeeded in getting Mr. and Mrs. Carroll to furnish a surety bond for him and, instead of returning the cash to Paccos, he turned it over to the Carrolls. When the sureties were exonerated, Paccos demanded the return of the cash from Rosenthal and the Carrolls and sued them. He obtained judgment, in addition to others, against Mrs. Carroll *personally* and on the appeal, the court said (at 425), "The objection that no personal judgment should have been entered against Mrs. Carroll, we likewise think is not well taken. She obligated herself personally on the bonds, and it was through

the means of these that the money was obtained. If it is the property of [Paccos], and if it has not been returned to him by [Carrolls], . . . she is personally responsible for its loss to the respondent."

Analysis of the above case shows that it was clearly a cause for money had and received and that no written promise by Mrs. Carroll to pay Paccos was involved. Yet a separate, personal judgment lay against her.

Again the language of *Lumbermen's National Bank v. Gross*, 37 Wash. 18, 79 Pac. 470 (1905), seems apt. A married woman signed a note for a community debt and the court said (at 23), "Under the law of this state, a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose."

In *Werker v. Knox*, 197 Wash. 453, 85 P. 2d 1041 (1938), judgment was entered against a wife *and* the marital community for a tort committed by the wife. The court based its reasoning in deciding whether it was a community tort or not on the nature of Mrs. Knox's errand when the tort occurred and said (at 462): ". . . the evidence that she intended to pay for the sweater out of that allowance falls short of proving that she had entered into a personal contract bind-

ing upon herself alone. The trial court found that Mrs. Knox was on a community errand.” The Supreme Court affirmed the separate and community judgment.

Enough has been said we feel to make it clear that when a wife becomes obligated on an implied contract to repay money had and received, the mere fact that the marital community of which she is (or was) a member may *also* be obligated does not exonerate her separate liability.

II.

The court held (R. 10, line 9 *et seq*) that the payments in question were made “. . . as compensation in part for the military services of the said Kenneth Schlafer” We are completely at a loss to understand how this holding can stand alongside the holding (R. 10, line 18 *et seq*) that such payments were made “. . . in violation of law . . . [as] no such family allowance entitlement appertained.” To state that a person is not entitled to a payment of money and in the same document recite that it is “compensation . . . for . . . services” is simply confusing and contradictory.

Appellant is aware that there is a line of cases (with which we do not agree) holding that such payments are family income but we hasten to point out

that all three cases which counsel have found, to wit: *Sterrett v. Sterrett* (Texas), 228 S.W. 2d 341 (1950); *Kipping v. Kipping* (Tenn.), 209 S.W. 2d 27 (1948); and *Hokenson v. Hokenson*, 23 Wash. 2d 908, 162 P. 2d 592 (1945), differed materially from this one in that (a) they were all divorce cases involving only the rights of husband and wife and not third parties, (b) all were concerned with the disposition of money *lawfully* paid to the wife, not, as here, where the payment was in violation of law and recoverable *ab initio*, and (c) the trial court under Washington law, at least, has the disposition of *all* property of *both* spouses before it, and could only be reversed for manifest abuse of discretion. Their language, we submit, was persuasive of the proposition that family allowances are family income and the unlawfulness in this case was overlooked by the trial court.

III.

Appellee pleaded in her Third Affirmative Defense (R. 6) that Kenneth Schlafer was indebted jointly with appellee, if appellee were indebted at all. The court found (R. 9) that Kenneth Schlafer still resided within the jurisdiction of the court and concluded (R. 10) that, for non-joinder of parties defendant, the action should be dismissed. It was not specifically stated whether Kenneth Schlafer was con-

sidered a necessary or indispensable party or both. We assume that the court must have felt Kenneth Schlafer to be an indispensable party for if he was considered only a necessary party, the court failed to follow Federal Rule of Civil Procedure 19(b) which states, in part, "When persons who are not indispensable, but who ought to be parties . . . are subject to the jurisdiction of the court . . . the court shall order them summoned to appear in the action." The proper remedy for a necessary party, if the court deemed him such, was, of course, simply to order him summoned and joined.

Schlafer could not be considered an indispensable party, on the other hand, under the rule of *Barney v. Baltimore*, 73 U.S. 280, 18 L.Ed. 825, 6 Wall. 280 (1867), which holds that all parties to a partition suit are indispensable and must be before the court. The court goes on to state that an act of 1839 (quoted at 281 and very similar to Rule 19) does not apply to a partition suit, but says that it does apply to an action against joint debtors for (at 287) ". . . the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to that debtor, because he is only made to perform an obligation which he was legally bound to perform before. The absent joint obligors are not injured, be-

cause their rights are in no sense affected, and they remain liable to contribution to their co-obligor”

The Second Circuit held to the same effect in *Greenleaf v. Safeway Trails, Inc.* (C.A. - 2d; 1944), 140 F. 2d 889, when construing our modern Rule 19. The court expressed doubt that Rule 19 applied to joint obligors at all but said that if it did, the remedy was to call in the absent defendants—not dismiss the action.

It would therefore appear that the most appellee was entitled to in the state of the pleadings was a finding of joint indebtedness and compulsory joinder of Kenneth H. Schlafer. Appellant denies in other parts of this brief that there was such joint indebtedness but, assuming, without conceding, that there was, the court erred in dismissing.

A careful reading of Washington case law reveals many dismissals where a plaintiff served one member of the community and sought in the suit to hold the community liable. They fail to reveal any instance where the rule was applied in reverse, as it was here, *i.e.*, the dismissal of an action against one person on the allegation by the defendant that the community ought to be a party and the other spouse had not been joined.

CONCLUSIONS

For the foregoing reasons we respectfully submit that the case should be reversed and remanded to the District Court with instructions to:

a. Enter judgment for plaintiff and against defendant Maud Elfer in the event that the Court of Appeals determines this to be a separate obligation of Maud Elfer, or

b. Reopen proceedings and order Kenneth Schlafer summoned before the District Court in the event that the Court of Appeals finds the said Kenneth Schlafer to be a necessary party to the proceedings.

Respectfully submitted,

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No. 15360

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

MAUD L. ELFER,

Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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UNITED STATES OF AMERICA,

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v.

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Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

The Appellee contends the decision of the District Court was correct in all respects and should be affirmed by this Court. The Appellant has separately stated the questions to be determined by this Court and Appellee

will supply her authorities and arguments to each question raised.

ARGUMENT AND AUTHORITIES

I.

Appellant contends the District Court erred in holding the alleged erroneous payments were made solely to the marital community of Defendant and her former husband and not to Defendant separately. The Appellant is frank to admit that it has been unsuccessful in finding legal authority for the position taken and proceeds to argue its position upon a "logical basis".

a. The Appellant proceeds upon the false assumption that: "Family allowances are a gift or a gratuity" as stated on page 7 of its brief.

In support of its position, Appellant refers (on page 9) to Internal Revenue Cumulative Bulletin 1942-2, page 53, stating that income tax is not imposed upon the government's contribution to the family allowance, considering it "in the nature of a gift by the Government". The Internal Revenue Department has also declared to be free from income tax the following: veteran's bonus; cash in lieu of living quarters; value of living quarters or allowances in lieu thereof to a chaplain; commutation of quarters; disability payments; gratuity pay; moving family and household effects on change of official station for permanent duty, with reimbursement by Government;

mustering-out payments; National Service Life Insurance dividends; subsistence; uniform allowance. The mere exemption from income tax of payments made to a serviceman or his dependents, does not by that act make the benefits in the "nature of a gift" where they are furnished as an incident to the services previously or presently rendered by the serviceman to his Government.

The land grant case of *Hatch v. Ferguson* (D.C. - Wash., 1895), 68 Fed. 43, cited on page 9 of Appellant's brief, has no connection with family allowances and does not support Appellant's position. The Court's attention is directed to *Kirchner v. Murray*, 54 F. 617, affirmed 5 Cir., 60 F. 48, which holds, in substance, that land given to volunteers in consideration of entering military service of Texas in her war of independence was held community property and was not a donation for services performed but was part consideration for such services.

The Texas decision in the case of *Johnson v. Johnson*, 23 S. W. 1022 (1893), involves a serviceman's pension, and has been cited by the Appellant to support its position. This decision, however, is based upon a Texas statute defining the term "pension" in 32 *Tex. Jur.*, p. 769, as follows:

"A regular allowance paid to an individual by a government in consideration or recognition of services rendered or of loss or damage sustained in the

public service. Grant . . . does not impose a contractual obligation; the allowance is gratuitous and in its continuance the pensioner has no vested right."

The Appellee acknowledges that a Washington statute declares property of a married woman acquired by gift shall be her separate property. No authority whatsoever has been cited by the Appellant that a family allowance or allowance to dependents under either of the cited acts of 1942 was "in the nature of a gift".

In *Hokenson v. Hokenson*, 23 Wn. (2d) 908, 162 P. 2d 592 (1945), the wife, like the Appellee herein, received \$50.00 monthly as a result of her husband's service in the navy and which was applied to her personal use. In that case the Court made the following observation:

"This money was undoubtedly community property."

The only case, the Appellee has found, in which the Court has been asked to determine squarely whether a family allowance was separate or community property, is *Sterrett v. Sterrett*, 228 S. W. 2d 341 (1950), a Texas decision. The Texas District Court entered a divorce decree in favor of the appellant wife finding that certain real estate was purchased by her with moneys from an allotment made out by the United States Government to the wife who was a Class A dependent under the Servicemen's

Dependents Allowance Act of 1942, as amended. This Court held that the real estate so acquired was community property. The wife appealed from this decision, arguing that the money, with which the real estate was purchased and improvements built, was that received by her from the Government under said Act and, therefore, her separate property. The Appellate Court stated that her contention placed before the Court the question of whether a governmental allotment under said Act to a serviceman's wife is her separate property or community property.

The wife in that case, as does the Appellant here, relied mainly upon the theory that the government allotment sent to her by her federal government *was a gift*, and therefore under the Texas community property statute, became her separate property. Various sections of the Servicemen's Dependents Allowance Act of 1942 were cited to the Court in support of her position.

The husband appellee cited in the *Sterrett* case as authority for his position:

"Sherburne's Adm'r v. U. S., 16 Ct. Cl. 491, thus: "Pay is a fixed and direct amount given by law to persons in military service, in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly termed, are indirect or contingent remun-

eration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement. Both pay and allowances are compensation for services while in service . . .”

The husband further cited *Kipping v. Kipping*, (Tenn.) 209 S. W. 2d 27, 28 (1948), in support of his position. The Court there stated that the right of a soldier to dependents' allowance was an integral part of his contract of enlistment. It was an inducement for enlistment, which in that case, as well as in the case at bar, was voluntary, and as an incident of the contract was doubtless enforceable at law. In that case the Court further stated that when the serviceman sacrificed his civilian earning capacity by enlisting in the Army, it seemed reasonable that his military earning capacity was substituted. The Congressional purpose in passing the Serviceman's Dependents Allowance Act of 1942 was to enable the enlisted man while serving in the Armed Forces to meet, to some extent, his common law obligation of support and maintenance of dependents.

The Court of Civil Appeals of Texas in the *Sterrett* case concluded: “*We find also the amount of money in question was a part of appellee's compensation for services rendered to his government in time of war and therefore same is COMMUNITY PROPERTY under our state laws.*”

b. Appellant next states a broad general rule concerning overpayment by mistake. Appellee does not agree that any repayment should be made by her.

c. Appellant abruptly concludes that the dependent has an implied obligation to repay, irrespective of the separate or community status, as the party receiving the same. No authority is furnished to support the conclusion that "any obligation of the wife to repay is her separate obligation". In view of the authorities cited that family allowance payments are *community property*, then any obligation to repay could be only a *community obligation*.

d. Appellant next contends that if the Appellee receives the overpayment as the agent of the then marital community, she has a personal obligation to repay. A general declaration of the principles with which we are here concerned appears in 41 C. J. S., Husband and Wife, Sec. 518 (c) on page 1109, as follows:

"A wife's capacity to bind herself or her property by contract has been held to be determined by the law of her domicile, and the character of a debt as separate or community by the law of the place where it arose."

This principle has been approved by the Supreme Court of Washington in *Meng v. Security State Bank of Woodland*, 16 Wn. (2nd) 215, 133 P. 2d 293 (1943).

Several Washington cases can be found showing the absence of personal responsibility of a wife for a community debt or obligation. In *McLean v. Burginger*, 100 Wash. 570, 171 Pac. 518 (1918), the Court was called upon to decide the responsibility for notes given for loans made to the husband for the benefit of the community. In holding that the notes were community obligations and that the wife had no personal responsibility thereunder, the Court stated the rule in this language:

“As heretofore stated, the debts of the community are likewise the husband’s debts. All debts contracted by him he is liable to pay, not only from the community estate, but also from his separate property, and is subject to be sued therefor both before and after the dissolution of the community. These debts are his debts, but are not ordinarily the debts of the wife, except in the sense that her interest in the community is burdened with the liability for their payment . . . *The separate estate of a wife by mere operation of law can never be made liable for community debts*, while both the community estate and the separate estate of the husband will be liable for any debt he may contract.”

In the later case of *Yakima Plumbing Company v. Johnson*, 149 Wash. 257, 270 Pac. 829 (1928) the Court approved the reasoning in the *McLean* case and states as follows:

“In this state, it is well settled that the wife personally is not bound for the debts of her husband whether incurred in the conduct of a business in his own right or in the conduct of a business on behalf of the community. The husband in each instance because he contracted the debt, and the community property is liable in the latter instance because the debt is contracted in the conduct of a community business; but our cases are uniform in holding that the wife is not personally liable in either instance, *unless she has, by an independent promise of some sort, made herself so personally liable. McLean v. Burginger*, 100 Wash. 570, 171 Pac. 518 (1918), and the cases there cited.”

The latter case answers the questions raised in the two cases cited on page 13 of Appellant's brief. In those cases as well as the two on page 14, the wife made a specific promise to pay or a specific assumption of the debt or obligation. The record is clear in this case that the Appellee under no circumstances has ever made an independent promise to pay or acknowledged an obligation to Appellant arising out of payment of family allowance.

On page 14 of its brief the Appellant strongly relies upon *Werker v. Knox*, 197 Wash. 453, 85 P. 2nd 1041 (1938), where judgment was entered against a wife and the marital community for a tort committed by the wife. The liability of a wife for her tort is specifically covered

by Washington statutory law. See 26.16.190 R. C. W. which reads as follows:

“Liability for acts of wife. For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her if the marriage did not exist.”

The only overt act with which Appellee can be successfully charged, is that of receiving over the period of her husband's enlistment in the United States Navy, a family allowance of \$50.00 monthly, and no more. No evidence has been submitted or charge made that she received any sums in excess of \$50.00 monthly during this entire period of time. In fact it could be urged that if any over-payments were made during the subject period of time, they must have been made to then husband of the Appellee as part of the pay and allowances specifically drawn by him.

II.

Appellant next contends that the District Court erred in holding that payments made in error and in violation of law were made as compensation for military services and constituted community income. Again, this is strictly a conclusion and has no authoritative basis. In fact the authorities listed on page 16 of Appellant's brief (except

for the *Hokenson* case) were first called to the attention of the trial court by the Appellee, and constituted authority upon which the Court's decision rested. At no time has it been claimed or established that Appellee was not entitled to the monthly family allowance of \$50.00. This action apparently arose (as stated in the Appellant's Statement of the Case on page 6) because the then-husband never exercised his option to waive the quarters allowance pertaining to his grade and continued to allow his dependent to draw family allowance. Appellant further acknowledges that the then-husband of Appellee drew (for all that the record reveals) his full pay and quarters allowance during the entire period of time. It seems obvious that the Appellant having permitted an apparent overpayment, should have caused both recipients of pay and allowances to be joined as parties defendants.

III.

Appellant finally contends the District Court erred in holding that KENNETH SCHLAFFER was a necessary and indispensable party to the action and in dismissing the action for failure to join him.

SCHLAFFER was without question an indispensable and necessary party to the action for the reason that he and the Appellee were husband and wife at the time of the alleged overpayment. They thereby constituted a marital community under the laws of the State of Washington,

and the husband by said law has the management and control of community personal property. See Section 26.16.030 R.C.W.

The partition case cited on page 17 of Appellant's brief has no relationship to the marital community or the obligation of the wife therein.

Appellant's reference to *Greenleaf v. Safeway Trails, Inc.* (C. A. - 2d; 1944), 140 F. 2d 889, on page 18 of its brief, involves a situation where two corporations promised to execute a promissory note to the Plaintiffs and in the action brought thereon one was not joined as a party defendant. The Court specifically ruled: "But one of several joint obligors is not an indispensable party to an action against the other", and "complete relief can be afforded between the plaintiff and Safeway without the presence of Eastern as a party defendant". A further examination of the *Greenleaf* case indicates the Court took into consideration a New York statute which permits a joint obligator to be sued separately.

In *Dolan v. Baldrige*, 165 Wash. 69, 4 P. 2d 871 (1931), the Court ruled as follows:

"The complaint alleges that the respondents are husband and wife; that Mrs. Dolan was injured as the result of the negligent operation of an automobile owned and driven by the respondents. Clearly, the action is against the respondents as a marital com-

munity. The liability, if any, for the tort of which appellant's complain, would be a community obligation. That being so, the husband was a necessary party defendant, without whom the action could not proceed, *as the action could not be maintained against the wife alone for a community obligation. It was essential, therefore, to the maintenance of the action against the marital community that either personal service or substituted service of summons be made upon the husband.*"

The District Court was therefore entirely correct in its determination that the husband was an indispensable party to this action. The Federal Rule of Civil Procedure of 19 (b) states as follows:

"Effect of Failure to Join. *When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both services of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired*

only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.”

The Court found (R. 9) that KENNETH SCHLAFER still resided within the jurisdiction of the Court. The Appellee's answer (R. 6) specifically sets forth her position that any claimed indebtedness must be one as against the then marital community and was not the personal debt of the Appellee. In her answer she specifically called to the attention of the Appellant and the Court, nine months prior to trial, that KENNETH H. SCHLAFER was alive, a citizen and resident of the district, subject to the jurisdiction of the court, and could be made a party without depriving the District Court of jurisdiction and has not been made a party. No request was ever made of the Court by the Appellant that SCHLAFER be joined as an additional party defendant, but Appellant has at all times maintained its position to sue only this Appellee.

CONCLUSIONS

The Appellee respectfully submits that the case has been properly decided by the District Court and should be affirmed.

Respectfully submitted,

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HONORABLE JOHN C. BOWEN, *Judge*

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Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

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United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

MAUD L. ELFER,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

I.

a. Appellant continues to maintain that family allowances are a gift or gratuity and that the payor-payee relationship is directly between the United States and the benefited dependent to the exclusion of other persons.

Appellee does not "assume" that family allowances are a gift. Appellant offered probative material in support of this contention. Appellant offered the reference to Internal Revenue Service Cumulative Bulletin 1942-2, page 53, as an indication of the reason given by the donor, United States, for exempting its own gift from its own tax and the words on page 9, line 14, of its brief are a literal quote from the IRS Bulletin — not a paraphrase. Appellee does not favor us with a statement by the IRS or anyone else as to why the various payments shown on page 2 - 3, lines 21 - 2, are exempted from income tax but we submit that the mere exemption of *other* payments *without stated reason* impairs in no way the probative value of a statement that family allowances are exempt because, in the words of the donor, they are a "gift".

Appellant, of course, never contended that family allowances were concerned in *Hatch v. Ferguson*, 57 Fed. 966, 68 Fed. 43 (9th Cir.-1895). Appellant does not concur in appellee's conclusion that its position is not supported thereby, but leaves that determination to the Court. The Court in *Hatch v. Ferguson* construed Washington community property law and we are content with the implications of that case.

We have examined carefully appellee's cited case of *Kircher v. Murray*, 54 Fed. 617; 60 Fed. 48 (5th

Cir. - 1894), and can only conclude that the dicta of the Fifth and Ninth Circuits differ in this respect. *Kircher* is obscurely phrased but scrupulous examination reveals that the only holding in the case is a dismissal in law because plaintiff's title (if any) is equitable. The action was a law action, trespass to try title, and plaintiff had no legal title or claim to the land in question. The action was therefore dismissed with ample dictum to the effect that plaintiff had equitable (*i.e.*, arising from community property) title. To the same effect was the so-called "affirmance" in 60 Fed. 48.

Appellant admits that the dictum in *Kircher* is persuasive of the proposition that a land grant given for entry into the armed forces is acquired by onerous and not lucrative title as in the case of a true gift. But, law or dictum, the Ninth Circuit on almost identical facts and law, says acquisition is by lucrative title. In *Kircher*, the law of Texas which gave rise to the land grant is paraphrased (at 622) to the effect that that section offered a bounty of land for volunteers in the auxiliary corps for three months' service. In *Hatch*, the lower court (57 Fed. 966) held that title to the land received by reason of service in the Mexican War was separate property, (at 971) "title having been acquired by him prior to . . . marriage" and the Ninth Circuit affirmed this holding (68 Fed. 43)

with the significant dictum already quoted in appellant's brief, page 9, last line. The land in question appears to have been given by reason of the Act of February 11, 1847 (ch. 8, 9 Stat. 123) which was titled "An Act to raise for a limited Time an additional military Force, and for other Purposes" and which stated in Section 9 (at 125), "That each [soldier] . . . who has served or may serve during the present war with Mexico . . . shall be entitled to receive . . . one hundred and sixty acres" We can distinguish this law in no significant particular from the Texas law construed in *Kircher*. Yet the dicta from Fifth and Ninth Circuits are squarely opposed.

Appellant takes issue with appellee's quotation from *Johnson v. Johnson*, 23 S.W. 1022 (1893), (p. 3, appellee's brief) citing 32 Tex. Jur. 769. The citation and quotation are from *Sterrett v. Sterrett*, 228 S.W. 2d 341 (1950), and are not even mentioned in *Johnson*. *Johnson* is correctly cited and quoted in appellant's brief, p. 10.

Appellee cites *Hokenson v. Hokenson*, 23 Wash. 2d 908, 162 P. 2d 592 (1945), (appellee's brief, p. 4) and appellant admits the correctness of the quoted dictum. As pointed out in appellant's brief (p. 16), it made no difference in the case whether the Washington court believed the family allowance to be sep-

arate or community as the trial court could have disposed of either in any reasonable manner. *Leonhard v. Leonhard*, 147 Wash. 311; 265 Pac. 1118 (1928).

We concede that appellee has quoted precisely and correctly from *Sterrett v. Sterrett* (brief, p. 5). We can only argue with all respect to the Texas court that it was fatally misinformed. Its decision in favor of the community property status of the money appears (at 343) to be bottomed on *Sherburne's Administrator v. U. S.*, 16 Ct. Cl. 491, and the erroneous assumption that the word "allowances" means the same thing at all times and places. Reading *Sherburne* shows plainly that the allowances treated in that case were the allowances of commissioned officers and senior non-commissioned officers, the latest version of which was the subject of the Pay Readjustment Act of 1942 which is explained on page 3 of appellant's brief; *not* the separate and distinct dependents' allowances of the law of seven days later. If such allowances are the same thing, we must answer in some manner the unanswerable: Why did Congress make them the subject of separate legislation? If family allowances are compensation for services rendered, why did Congress say: "Entitlement to and payment of any family allowance . . . to the dependent . . . shall not be contingent upon pay accruing to such enlisted man or upon the monthly pay of such man being re-

duced by or charged with any amount" (57 Stat. 580), while stating as to first three-grade allowances (56 Stat. 364), "Enlisted men entitled to receive allowances for quarters or subsistence, shall continue . . . to receive such allowances while . . . in a pay status" Note carefully the difference. The top grade enlisted men draw such allowances in their own right and only when in pay status, *i.e.*, periods of absence without leave, etc. would result in forfeiture of pay or compensation and the concurrent allowances. The dependents of the lower grades draw different allowances in their own right and regardless of whether compensation accrues to the military man or not. Can it still be contended that family allowances are compensation for services rendered? If they be such compensation, why are they not subject to court-martial forfeiture [they are not] along with the rest of the erring soldier's pay? If they be compensation for services rendered to the United States by the husband-wife community, what is the status of a family allowance paid to the "former wife divorced" (56 Stat. 381, line 40) or the "sister of such enlisted man" (*ibid*, line 43)? Would appellee have appellant sue the marital community for an erroneous overpayment to the husband's sister? When we employ such *reductiones ad absurdum*, it becomes clear that, regardless of the superficial similarity to the *Sherburne* "allow-

ances" which misled the *Sterrett* court, they are really separate and distinct and the Class F family allowances are a gift to the dependent.

A similar plan was in operation during World War I as authorized by the Act of October 6, 1917 (ch. 105, 40 Stat. 398 at 402 *et seq*) and the relationship from the United States to the donee was, if anything, clearer than in the present law. In Section 204 (at 403) of that law it was stated, "... a family allowance of not exceeding \$50.00 per month shall be *granted* [i. s.] and paid by the United States" The mechanics of the paying procedure differed slightly but be it sufficient to say that it resembled World War II procedure in that it provided for a compulsory allotment by the enlisted man to his dependent and a grant by the United States.

Even the weak reed of the *Kipping* case, 209 S.W. 2d 27 (1948), (appellee's brief, p. 6) is not available to appellee here. *Kipping* held that the family allowance was (at 29) "... an integral part of his contract of enlistment. It was an inducement for enlistment, which in this case was voluntary, and as an incident of the contract was doubtless enforceable at law." From the facts stated in *Kipping*, it appears that Kipping enlisted voluntarily on November 2, 1942, and was constructively aware of the existence of the Act

of June 23, 1942, although whether it formed, in law, a *quid pro quo* in his enlistment contract is highly doubtful. Counsel for appellee states on page 6, line 10, "It was an inducement for enlistment, which in that case, as well as in the case at bar, was voluntary" We assume it to be appellee's purpose to show that Schlafer's enlistment (a voluntary one, we concede) was on the same *quid pro quo* basis as that found by the court in *Kipping*. Schlafer, it should be noted (R. 8, line 19) enlisted four (4) days before the law was passed! If one may make a true bilateral contract with the sovereign concerning military service (and such is doubtful in view of the sovereign's power to alter unilaterally the terms of the contract: *e. g.*, to discharge prematurely, to hold in service because of war or national emergency, to decrease pay and yet hold to the enlistment contract), one may surely not write into or imply into such contract, a consideration or gratuity which does not even exist! So much for appellee's adoption by reference of the reasoning of the *Kipping* case.

We must not lose sight of the fact at any time, that the sole purpose of the foregoing exposition has been to show the identity of the payee-donee of lawful payments of family allowances. Appellant maintains that the dependent was the sole party receiving such from the United States. If lawful, such payments

were her separate property. If unlawful, hers is the obligation to repay.

b. We quite agree that appellee does not wish to repay. We find no legal significance therein.

c. We do not concede that "appellant abruptly concludes" etc. We feel that thus far appellant has attempted to demonstrate only the *legal entity* (wife separately or marital community) which was the recipient of the unlawful payments. Having shown it to be the dependent in the first instance (regardless of whether she ultimately passed the benefits to the community) we feel that particular legal consequences flow therefrom. We feel that item "c." in our brief is a conclusion of law which, if the wife received the money as a separate gift, is inescapable.

d. Appellee's citations under point "d." insofar as they concern the separate obligation of a wife to repay on a community obligation *incurred by her husband*, we quite concede. The wife has no such obligation. If the marital community by and through the husband (Schlafer) received the overpayments, no separate obligation is imposed on the wife. But such was not the case. The *Meng* case (appellee's brief, p. 7), the *McLean* and *Yakima Plumbing* cases (p. 8), on their facts, are not in point. Counsel insists that a wife under community property law cannot be liable

to pay a debt unless she has made an "independent promise of some sort". Counsel apparently disregards the entire field of quasi-contracts or contracts implied in law. In such contracts, no one makes an actual promise. Yet the law implies one. Appellant's entire position in this case is based on the fact that, payments having been made by mistake, the law *implies* a promise to repay. The payee having been the wife, the implied promise flows from the wife. Appellee's own citation of *Yakima Plumbing Supply Co. v. Johnson*, 149 Wash. 257, 270 Pac. 829 (1928), supports appellant's position wherein it is said (at 260):

"The husband is personally liable in each instance [*i.e.*, for a separate debt contracted by him or a community debt contracted by him] *because he contracted the debt [i. s.]*, and the community property is liable in the latter instance because the debt is contracted in the conduct of a community business; . . ."

The *Yakima* case in the underscored portion makes clear the reason in Washington law for holding the husband separately liable on a community debt — simply because he was the contracting party and bound himself as well as the community for which he acted. In this case the reverse is true and the corollary law must be applied. The quoted portion of the *Yakima* case should be read as follows: "The [wife] is per-

sonally liable in each instance because [she] contracted the debt”

Appellee further contends that appellee’s only overt act was in continuing to draw, during the litigated period, the allowance of \$50.00. Appellant has never charged bad faith on the part of appellee. However, an action in restitution does not, of course, rest on fraud or bad faith. See 46 Am Jur, *Restitution and Unjust Enrichment*, p. 99.

Appellee cannot make the argument that the then husband drew overpayment in any sense. As stated in our brief at page 3, the Servicemen’s Dependents Allowance Act provided *only* for the disbursement of public money to dependents of “last four graders”, the payments of such money to any other people were unlawful, the trial court so found (R. 10, Conclusion of Law III) and appellee has never contested such a conclusion. He cannot do so now.

II.

Appellee’s argument under Section II of his brief completely eludes appellant. Appellee states (p. 11):

“At no time has it been claimed or established that Appellee was not entitled to the monthly family allowance of \$50.00.”

Appellant *claimed* (R. 3) :

“... defendant Maud L. Elfer was the wife of a . . . [sailor] and receiving family allowance as wife the serviceman by reason of whose naval service . . . defendant had heretofore received . . . allowance, was promoted to an enlisted grade . . . to which . . . no . . . allowances accrued. . . . payments continued . . . erroneously . . . and an overpayment . . . resulted.”

We cannot spell out our claim much more clearly nor can we conceive that we should be required to.

Appellant *established* (R. 8) :

“... Schlafer was promoted to . . . one of the first three pay grades within the meeting [sic] [meaning?] of the . . . Act

“[R. 10] That the payments . . . were made . . . in violation of law, inasmuch as . . . to which grade no such . . . allowance . . . appertained.”

If appellee can possibly be *entitled* to a payment made in error and violation of law, we cannot understand the reasoning. As we noted in I, *supra*, appellee has taken no exception to the Conclusion of Law so quoted and is bound by it.

In view of appellee's comments (page 11, line 5 *et seq*) on the failure of the husband to waive quarters allowance, we shall labor what we consider to be clear law in order that the Court may not err in its de-

termination of *which party* was overpaid. Under the Dependents Act, the dependent was entitled to a family allowance and the military person's only connection with the matter was a deduction from his pay. This entitlement ceased by internal limitation of law as soon as the military person ceased to be a member of the "fourth, fifth, sixth or seventh grades" which, in Schlafer's case, occurred in July 1943 (R. 8, line 28 *et seq*) and any payment after that date became unlawful. In July 1943 there was *no* "option" available to Schlafer and he had to take the quarters allowance provided by 56 Stat. 359 at 364 or nothing. It was not until October 1943 (appellant's brief, p. 4) that the "option" became available under which *by affirmative action* Schlafer could have taken steps to restore the family allowance to a status of legality. Absent such affirmative action, it continued to be unlawful. In an action for restitution, we are not of course concerned with blame or fault in any sense and there can be no question as a matter of law as to which payments were unlawful.

III.

Appellee indicates in Section III that appellant feels that the District Court held that Kenneth Schlafer was a necessary and indispensable party.

Appellant was forced to that assumption in order to understand the Court's action on any basis.

Laying aside the fact that appellee's quotation from *Dolan* (appellee's brief, p. 12) is dictum, we do not argue with the law set forth therein, *i.e.*, that an action against a marital community in Washington must join the husband as a party defendant. But appellant did not seek to sue a marital community in this action. The complaint was not, therefore, subject to dismissal on its face. Even in the *Dolan* case, if the action were properly held to be one against the marital community, it was subject to dismissal *only* because the husband *could not be joined*, the statute of limitations having run before he was served. Otherwise, the state court would have had to proceed under RCW 4.08.130 which states ". . . the court shall cause them [additional parties] to be brought in." In other words, if we assume (which we do not concede) that the District Court properly found this to be a cause against the marital community, the only proper result was to order the husband before the court — not dismiss the action. To a similar effect is Rule 2 (3), Rules of Pleading, Practice, and Procedure of the State of Washington, which reads in part:

"No action . . . shall be defeated by the non-joinder or misjoinder of parties. New parties may be added . . . by order of the court"

We assume for the purpose of this reasoning that appellee's statement in Third Defense as to Kenneth Schlafer's amenability to jurisdiction, etc. may be read in conjunction with appellee's Second Defense.

Inasmuch as the Court concluded (R. 10, Conclusion II) "That the payments . . . were made to the marital community composed of Kenneth Schlafer and Maud Schlafer . . .", we assume that the Court did not find a joint indebtedness as pleaded in Third Defense (R. 6). While appellant never sought either determination and both would not be mutually inconsistent — *Churchill v. Miller*, 90 Wash. 694; 156 Pac. 851 (1916) — if we consider that the determination of marital community liability was correct, the dismissal was of course improper. FRCP 19(b) as noted in our opening brief simply renders it mandatory for the trial court to summon the husband. To the same effect is FRCP 21 which permits: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative. . . ."

Appellee makes the point on page 14 of the brief that, although appellant was on notice of appellee's claim of marital community indebtedness, appellant took no steps to cause Kenneth Schlafer to be summoned into the action. We find no authority for ap-

pellee's position. Rule 21 permits joinder on the motion of any party, and we should reason that the party on whom the burden lies is the party maintaining the necessity for an additional party. We note in 39 Am Jur, *Parties*, § 85,

"In many jurisdictions the . . . rules of practice provide, . . . that when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in, thus imposing a mandatory duty upon the courts. . . . notwithstanding no objection to their absence has been raised by demurrer or answer."

We have found no case under the Federal Rules of Civil Procedure interpreting Rules 19 and 21 in this respect but the foregoing would appear reasonable and just. We note in the *Cyclopedia of Federal Procedure*, Third Edition, § 21.77, it is said,

"Either upon objection taken by the defendant or by the court upon its own motion, the court may direct the amendment of the complaint to include the omitted or absent indispensable party or have the complaint dismissed if the amendment is not made. Of course, if the indispensable party is beyond the jurisdiction . . . the complaint must be denied."

It would seem to appellant that the burden was upon appellee to move the joinder of Kenneth Schlafer, it being appellee's theory of the case. Upon the Court's

determination that the indebtedness was community, it further appears that the Court should have directed Kenneth Schlafer summoned *sua sponte*, or have directed appellant to cause Kenneth Schlafer summoned. In any event, the action should not have been dismissed.

Respectfully submitted,

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